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ABSTRACT

The Capital Area School Development Association Conference was held in July 1998. These proceedings include the following presentations: "Recent Decisions of the State and Federal Courts, the Commissioner of Education and PERB"; "Civil Service Law for School Districts"; "Mental Disabilities Under the ADA"; "The Role of the Board of Education in Collective Bargaining"; "Recent Developments at PERB"; "Discipline and Disabilities: Surviving the Special Education Maze; and Termination of Teachers During the Probationary Period." The following subareas were treated under "Recent Decisions of the State and Federal Courts": First Amendment Religion Cases; First Amendment Free Speech Cases; Student Constitutional Rights; Student Discipline; Employee Discipline, Employment Discrimination; Employment Contracts; Tenure And Seniority Rights; Taylor Law Issues; School District Budget Vote and Board Member Election; Sex Discrimination; Sexual Harassment; and Sex Offender Statutes. (DFR)

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CASDA
Thirteenth Annual
School Law Conference

July 16, 1998

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Latham, New York

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Preface

The Capital Area School Development Association (CASDA) sponsored its Thirteenth Annual School Law Conference on Thursday, July 16, 1998. The conference fulfills a need in the Greater Capital Region for school board members and administrators who desire to maintain and improve their knowledge in the area of school law. As a further service, CASDA is presenting these proceedings of the Thirteenth Annual School Law Conference for each participant who attended the conference.

We thank the presenters at the School Law Conference for supplying us with texts of their presentations. In the interest of economy and time, the papers have been reproduced as typed and presented to us. We thank the attorneys for their presentations on July 16 and for the written texts.

We are happy to present these proceedings to the participants at the conference as another service of CASDA.

Richard Bamberger
Executive Director
Capital Area School
Development Association

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RECENT DECISIONS OF THE STATE AND FEDERAL COURTS THE COMMISSIONER OF EDUCATION AND PERB

Presented by:

Jay Worona
General Counsel
New York State School Boards Association

at the
Annual School Law Conference
of the
Capital Area School Development Association

at the

Century House
Latham, New York
July 16, 1998

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FIRST AMENDMENT RELIGION CASES

Aid to Parochial Schools

1. Agostini v. Felton, 117 S.Ct.1997, 65 U.S.L.W. 4524, 119 Ed. Law Rep. 29 (6/23/97).
The U.S. Supreme Court ruled that sending public employees into parochial schools to provide Title I services, including remedial instruction and counseling, does not violate the Establishment Clause of the First Amendment to the United States Constitution. While the court's decision does not require the provision of Title I services on the premises of parochial schools, it permits such a practice under certain circumstances. In so holding, the court reversed its ruling in Aguilar v. Felton, 473 U.S. 402 (1985) and a portion of its ruling in School District of City of Grand Rapids v. Ball, 473 U.S. 373 (1985). The United States Department of Education has issued a guidance for school districts which decide to provide such services on the premises of parochial schools.

2. Russman by Russman v. Sobol, 85 F.3d 1050, (2nd Cir.(1996)), cert. granted and judgment vacated, 117 S.Ct.2502, (6/27/97).
A panel of the United States Court of Appeals for the Second Circuit, with jurisdiction over New York, ruled that IDEA requires a school district to provide a consultant teacher and a teacher aide to a disabled student on the premises of a parochial school, and that the provision of such services does not violate the Establishment Clause. The United States Supreme Court vacated the decision and sent the case back to the Second Circuit to reconsider its decision in light of the recent reauthorization of IDEA. NYSSBA, which is representing the school district in this matter, submitted a brief to the Second Circuit on September 22, 1997, and is waiting to hear whether the court will require oral argument on the issue.

3. K.R. v. Anderson Community School Corp., 125 F.3d 1017 (7th Cir. 9/10/97)(*cert. denied* 1998 WL 138974 (U.S.).
After being remanded by the United States Supreme Court in light of the Reauthorization of the IDEA, the court ruled that neither IDEA nor its implementing regulations require a school district to provide an instructional assistant to a disabled student on the premises of a parochial school. The district had offered to provide a full-time instructional assistant at a public school and had continuously provided other services such as speech, occupational and physical therapy at a public school facility, while the student attended the parochial school. This decision was once again appealed to the United States Supreme Court and, on April 1, 1998, the Court refused to hear the appeal.

4. Fowler v. Unified School Dist. No. 259, 128 F.3d 1431(10th Cir.1997).
On remand from the United States Supreme Court, the Tenth Circuit reaffirmed its interpretation that IDEA, prior to the 1997 Reauthorization, required school districts to provide special education services to students voluntarily attending private schools on the premises of such private schools. However, the court also observed that under the new amendments to IDEA, "states need not spend their own money to provide special education and related services to voluntarily placed private school students, and they need not pay the cost of education, including special education and related services, to students to whom FAPE has been offered. Rather, their only obligation is to make available to such students a proportionate amount of their Federal funds. However, nothing prevents states from voluntarily providing more, from their own funds."

5. Cefalu v. East Baton Rouge Parish School Board, 117 F.3d 231,119 Ed. Law Rep. 338 (5th Cir. 7/3/97).
The United States Court of Appeals for the Fifth Circuit ruled that a school district is not required under IDEA to provide a sign language interpreter to a disabled private school student on the premises of his private school. Accepting the United States Department of Education's position, the court ruled that the statute imposed no obligation on the district to provide special education services

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at the private school when the district had provided an appropriate special education program at the public school. In addition, the court accepted the department's position that IDEA does not require a school district to spend non-federal funds for the provision of special education services to students voluntarily enrolled in private schools, but rather, districts must provide a proportionate share of federal funds to students voluntarily enrolled in private schools.

6. Grumet v. Cuomo, 90 N.Y.2d 57, 119 Ed. Law Rep. 603 (5/6/97).
In an unanimous (7-0) decision, the New York Court of Appeals held that the 1994 state law allowing the re-creation of the Kiryas Joel Village School District, "violates the Establishment Clause [of the United States Constitution] by singling out the Village of Kiryas Joel for special treatment and thereby demonstrating impermissible government endorsement of this religious community." The Court of Appeals found especially "problematic" the provision in the law limiting its application to only those municipalities "in existence as of the effective date" of the law. Observing that the "legislative history contains no explanation for this cut-off, and defendants' submissions omit any mention of it," the Court found that "[n]o other group can hereafter do what Kiryas Joel did."

7. Grumet v. Pataki, 1998 W.L. 386272 (3rd Dept. 7/09/98).
The Appellate Division, Third Department, unanimously affirmed the ruling of the State Supreme Court for Albany County, which had struck down as unconstitutional a law enacted by the State of New York to enable the Village of Kiryas Joel to reestablish its own publicly funded school district for a third time.

8. Stark v. Independent School Distist, No. 640 123 F.3d 1068 (8th Cir. 1997).
The Eighth Circuit Court of Appeals concluded that the Establishment Clause was not violated by a school district's decision to reopen a school building that had been closed for seven years in response to a local religious sect's request. All of the students who attend the single multi-age classroom in the building belong to the same religious sect. However, the court was persuaded that several factors weighed in favor of the school district's decision including: the school was open to non-sect children, the regular public school curriculum was not altered in any way, and objectives of achieving space efficiency, saving in transportation costs, and the reduction of class sizes at the district's other elementary school had been met.

Devotional Activities and Religious Observances in Public Schools

1. Bauchman v. West High School, No. 95-4084 (10th Cir. December 19, 1997).
The performing of religious songs at predominantly Christian religious sites by a high school choir did not constitute a violation of the establishment clause where a reasonable observer could assign a plausible secular purpose to the selection of such songs and their performance at religious sites and where a reasonable observer would not conclude that the effect of performing those songs at religious sites was to endorse or advance religion, according to the Tenth Circuit of the United States Court of Appeals.

2. Bown v. Gwinnett County School District, 112 F.3d 1464, 118 Ed. Law Rep. 28 (11th Cir. 5/6/97).
The Eleventh Circuit upheld a state law requiring 60 seconds of quiet reflection in public classrooms. The court applied the Lemon test and found that the statute had a secular legislative purpose, had a primary effect which neither advanced or inhibited religion, and that it did not require excessive government entanglement with religion.

Display of Religious Symbols

1. Elewski v. Syracuse, N.Y., 123 F.3d 51(2d Cir.1998)(*cert. denied* 118 S.Ct.1186).
The Second Circuit Court of Appeals ruled that the display of a city-owned creche in a downtown public park at public expense does not violate the Establishment Clause. The court found that the government display, when viewed together with a privately sponsored menorah displayed nearby and

other traditional religious and secular decorations in the area, did not endorse religion but, instead, celebrated "the diversity of the holiday season" in large part for downtown businesses. According to the court, it is not who owns the creche that is dispositive for Establishment Clause purposes. The true test is whether a message of endorsement would be perceived by a reasonable observer.

2. Grossbaum v. Indianapolis-Marion County Building Authority, 100 F.3d 1287, 65 U.S.L.W. 2354 (7th Cir.1996), cert. denied, 117 S.Ct. 1822, 65 U.S.L.W. 3762 and 3766 (5/19/97).
The court upheld a local government's decision to ban all private displays from the lobby of a government building based upon the conclusion that the policy was a content-neutral law of general applicability and, as a result, did not violate the First Amendment. In this case, a Jewish organization sued the municipality after it refused to display a menorah in the lobby under its prior policy banning all religious displays. A court determined that the prior policy violated the First Amendment because it restricted religious speech and ordered the municipality to display the menorah. In light of the court's decision, the municipality decided to ban all displays and was again sued by the Jewish organization. The court also rejected the plaintiffs' claim that the municipality was retaliating against the group because of their prior legal victory.

Equal Access by Students

1. Hsu v. Roslyn Union Free School District No. 3, 85 F.3d 839, (2nd Cir.1996), cert. denied, 117 S.Ct. 608, 65 U.S.L.W. 3430 and 3432 (12/16/96).
The United States Supreme Court declined to hear an appeal of a decision from the Second Circuit Court of Appeals which held that a school district could not prohibit a student bible club from requiring that certain officers be Christians. Students challenged the district's prohibition alleging that it violated the Equal Access Act (EAA). The district argued that such a requirement violated the district's non-discrimination policy. The lower court ruled in favor of the district, finding that the non-discrimination policy allowed the club to meet on the same basis as other clubs and that an exemption to the non-discrimination policy would constitute an excessive entanglement with religion in violation of the Establishment Clause. In reversing the lower court, the Second Circuit determined that the speech protected by the EAA included the selection of the club's leadership positions. Furthermore, it ruled that a religious club may insist that those in certain leadership positions have a commitment to its cause in the same way that a secular club may do so.

Use of School Facilities by Outside Religious Groups

1. Bronx Household of Faith v. Community School District No. 10, 127 F.3d 207(2nd Cir.. 1997), *cert. denied*, 140 L.Ed.2d 670, U.S. Apr. 20, 1998, No. 97-1361.
The court ruled that a school district is generally not required to grant a religious group's request to use school facilities for religious services or instruction. In this case, an evangelical Christian church submitted a request to use the school gym for worship services each Sunday, which included hymn singing, communion, Bible reading, Bible preaching and teaching. The district rejected the request based on district regulations promulgated pursuant to the education law. While the district's regulations permitted outside groups to use its facilities for a number of purposes, including discussing religious material or material which contains a religious viewpoint, the regulations specifically prohibited using school facilities for religious services or instruction. The district had previously permitted the church to use its facilities for a sports program and banquet, but had never before permitted its premises to be utilized by an outside group to conduct religious services or provide religious instruction. The church sued, claiming that the refusal to rent the gym for religious worship violated the First Amendment. The court concluded that the district created a "limited public forum" and could therefore limit access to its facilities to outside groups for certain specified subject matters, while excluding others, as long as the regulations were reasonable in light of the purpose to be served by the school building, and the district did not discriminate on the basis of a speaker's viewpoint within the subject matter. The court then determined that the regulations were reasonable, stating "We think it is reasonable for these authorities to consider the effect upon the minds of middle

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school children of designating their school as a church. And we think it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises for regular church services." School districts which have previously granted access to their facilities to outside groups for the purpose of conducting religious services or instruction may not be aided by this decision. NYSSBA submitted a friend of the court brief on behalf of the district in this case. The Second Circuit refused the church's request for the entire court to review the case and recently, upon appeal to the United States Supreme Court, the high court also refused to hear an appeal of this case.

2. Full Gospel Tabernacle v. Community School District No. 27, 979 F.Supp. 214 (S.D.N.Y. 1997).

The court ruled that a school district could refuse to rent its facilities to a church for religious worship services on the grounds that the Education Law and its own policies and regulations prohibited such use. The issues in this case mirror those in Bronx Household of Faith v. Community School District No. 10, with the exception that the district in this case had previously granted access to school facilities to other churches for religious worship services and instruction. The district did not deny that such access had been permitted, but argued that it had been granted erroneously by an employee in the department responsible for such requests when the department's director position was vacant. The court ruled that while past practice is a relevant factor in determining if a district has opened its limited forum to religious worship, it is not determinative when a district mistakenly grants access to its facilities for religious worship and instruction. NYSSBA submitted a brief on behalf of the district in this case. The church has appealed to the United States Court of Appeals for the Second Circuit.

3. Saratoga Bible Training Institute, Inc. v. Schuylerville Central School District, __ F.Supp.__ (1998).

In this case a school district had a policy which prohibited any organization from using school facilities for lectures, rallies, demonstrations, political events or seminars. The stated reason for the district's policy was to prevent "transforming the district into a stage for public debate and controversy." When a religious group submitted an application to use the district's high school auditorium for the purpose of holding a lecture about the origin of man from a biblical viewpoint, the district denied the request, based upon its policy. The religious group then sued the district, claiming that the district's denial of its application for the use of school facilities constituted a violation of the First Amendment. However, the federal district court ruled in favor of the district. The court determined that the district had created a limited public forum by allowing outside groups to use the high school auditorium in the past, but the court ruled that the district's refusal to allow the religious group to use the auditorium for a lecture was not discriminatory, because the district consistently had refused to allow other groups (including the League of Women Voters, Farms First, and a telecommunications company) to use the auditorium for lectures in the past.

4. Liberty Christian Center, Inc. v. Bd. Of Educ of the City School District of the City of Watertown, 1998 WL 32878 (6/8/98).

The Federal District Court for the Northern District of New York ruled that the Watertown City School District violated the constitutional rights of members of a religious group when the district denied them use of the school cafeteria for religious worship. The district argued that §414 of the Education Law does not permit school buildings and grounds to be used for religious worship. However, evidence was presented that the district's facilities had been used in the past for religious worship, albeit without the district's prior approval. According to the court, the district was chargeable with the knowledge that its facilities had been used for religious worship in the past, and therefore, it could not discriminate against another group that wanted to use the facilities for the same purpose. The court suggested that the district could prevent use of its facilities for religious worship and instruction by adopting a written policy prohibiting any group or organization from using school buildings and grounds for such purposes.

Religious Freedom Restoration Act

1. Citv of Boerne v. Flores, 117 S.Ct. 2157, 65 U.S.L.W. 4612 (6/25/97).
The U.S. Supreme Court held that the Religious Freedom Restoration Act is unconstitutional. As a result of the Court's decision, governments (including school districts) are no longer required to demonstrate a "compelling state interest" to justify the imposition of a burden on an individual's right to religious liberty.

Free Exercise of Religion

1. Swanson v. Guthrie Independent School District, [__F.3d__] 1998 WL 31743 (10th Cir. Jan. 29, 1998).
The Tenth Circuit considered whether public school officials in Guthrie, Oklahoma, could prohibit a home-schooled eighth-grader from attending public school classes part-time. The plaintiffs argued that the school board's full-time attendance policy burdened their full and free exercise of religion. The Tenth Circuit disagreed. Even if the policy had an *incidental* impact on their religious beliefs or practices, said the court, it included no element of coercion that would run afoul of the free exercise clause: "The policy does not prohibit [the Swansons] from home-schooling Annie in accordance with their religious beliefs, and does not force them to do anything that is contrary to those beliefs." Relying upon the standard set forth in Employment Division v. Smith 494 U.S. 872 (1990), the court stated that the school board policy was "a neutral policy of general applicability." Therefore the policy did not have to meet a strict scrutiny standard.

2. Helland v. South Bend Community School Corp., 93 F.3d 327, 111 Ed. Law Rep. 1108 (7th Cir. 1996), cert. denied, 117 S.Ct. 769, 65 U.S.L.W. 3503 and 3505 (1/21/97).
The United States Court of Appeals for the Seventh Circuit dismissed a religious discrimination action brought against a school district by a substitute teacher who claimed that the district unlawfully removed him from the substitute teacher list on the basis of his religious beliefs. The district asserted that it removed the substitute from its list based on his unsatisfactory job performance. According to the district, the substitute failed to follow lesson plans, failed to control his students, and improperly injected his religious beliefs into the classroom. The school district asserted that while it did not find fault with the substitute's carrying a Bible to work and reading it in private, it did object to his reading it aloud to students and discussing religion during class. The court determined that the substitute failed to demonstrate that the non-discriminatory reasons given by the school district for removing his name from the list were merely a pretext for an illegal action.

Prosecutorial Immunity Under the Establishment Clause

1. Doe v. Phillips, 81 F.3d 1204, 64 U.S.L.W. 2678 (2nd Cir. 1996), cert. denied, 117 S.Ct. 1244, 65 U.S.L.W. 3621 and 3629 (3/17/97).
The court ruled that a prosecutor was not entitled to absolute or qualified immunity in an action brought by a defendant claiming that the prosecutor coerced a religious practice in violation of the Establishment Clause. The prosecutor had conditioned the dismissal of criminal charges against the defendant upon her swearing her innocence on a bible in a church.

FIRST AMENDMENT FREE SPEECH CASES

Student Free Expression Rights

1. Bd. of Educ. of Monticello CSD v. Commissioner of Educ., 91 N.Y.2d 133 (1997).
A school district's ten day suspension of a student who distributed, on school grounds, a publication that encouraged other students to destroy school property and to engage in acts of insubordination was upheld by the court, overturning a ruling by the Commissioner of Education. The student admitted bringing to school copies of a newspaper style publication he had produced on a home computer, certain portions of which he claimed to have personally written. The newspaper contained vulgar language and encouraged students to urinate on floors, throw garbage about the school

courtyard, write graffiti on school walls and smoke in the bathrooms. Moreover, the article noted that the police would be powerless to control the population of more than 1,000 students. The Appellate Division, Third Department found that the suspension did not violate the student's First Amendment rights to freedom of speech and expression because there was sufficient evidence to support the charge that the student's conduct endangered the safety, health and welfare of others. The New York State Court of Appeals unanimously affirmed the decision on December 2, 1997.

2. Phoenix Elementary School District No. 1 v. Green, 189 Ariz. 476, 943 P.2d 836 (1997). Although not binding in New York, this decision is significant, because it is the first case in the nation to uphold the constitutionality of a mandatory policy requiring students in a public middle school to wear uniforms. The Court ruled that essential to a successful defense of a constitutional challenge against a mandatory uniform policy are three things: The dress code must (1) bear a reasonable relation to the pedagogical purpose of the school; (2) include alternative avenues of expression; and (3) indisputably be a content-neutral regulation of student dress.

3. Stephenson v. Davenport Community School District, No. 96-1770 (8th Cir. April 9, 1997).
The Eighth Circuit ruled that a school district regulation, under which a high school student was forced to remove a tattoo, which the district considered gang-related, or else be subject to suspension or expulsion, was unconstitutionally vague.

4. Yeo v. Lexington, Mass, No 96-1623 (1st Cir. 1997).
A divided panel of the First U.S. Circuit Court of Appeals held that a high school newspaper's and yearbook's refusal to accept an advertisement implicated state action and public forum doctrine. Accordingly, the district court improperly granted summary judgment to the defendants in the resulting lawsuit.

Staff and Board Members Free Expression Rights

1. McEvoy v. Spencer, 66 U.S.L.W. 1122, CA 2, No. 96-9333 (8/11/97).
The Second Circuit Court of Appeals held that policy-making public employees cannot shield themselves from politically based adverse action by speaking out on issues of public concern. In this case, the court ruled that a police commissioner who was allegedly demoted because of his political affiliation and his speech failed to state a First Amendment claim.

2. Appeal of Craft & Dworkin (Yonkers City School District), 36 Educ. Dep't Rep. 314 (2/19/97).
A school board member may not abstain from voting on whether to grant tenure to an employee based upon a philosophical objection to the state's tenure system, according to the commissioner of education. School board members are "public officers," and as such, take an oath to obey federal and state laws, including the state's tenure laws, reasoned the commissioner, who made it clear that a board member who abstains from a tenure vote based upon philosophical objections to the tenure system faces possible removal from office for dereliction of duty. The commissioner rejected the claim that board members have a First Amendment right to express their philosophical objections to tenure. In addition, the commissioner ruled that the board members were not entitled to a certificate of good faith pursuant to §3811(1) which would have enabled them to be defended and indemnified by the school district.

3. Application of Dinan, 36 Educ. Dep't. Rep. 370 (04/02/97).
A district resident asked the commissioner to remove the president of the board of education from the board for writing and submitting personal opinion letters for publication in the local newspaper. The letters were signed by the board president, using his title. The complainant contended that it was improper for the board president to use his title in signing these letters. The commissioner dismissed the petition calling for the president's removal, observing that "[a]lthough an individual board member is not entitled to have his opinion published at district expense in board publications, this does not mean that he may not communicate his views at his own expense...and engage in partisan activity, provided school district funds are not used."

4. Boring v. Buncombe County Board of Education, 136 F.3d 364 (4th Cir. 1998).
The Fourth Circuit Court of Appeals, sitting en banc, affirmed a district court decision that a public school teacher's choice of plays for a statewide competition was not a matter of public concern and that the school had a legitimate pedagogical interest in not allowing the play.

Free Expression Rights of Third Parties (On School Grounds)

1. Hone v. Cortland City School District, 985 F. Supp. 262 [123 Educ. L. Rep. 605] (N.D.N.Y. 1007).
A reporter repeatedly attempted to initiate personal contacts of a sexual nature, rather than a journalistic nature, with two female coaches and was banned from school grounds. The court found the public secondary school's rule barring the reporter from school grounds did not violate the reporter's First Amendment rights to freedom of the press, speech, or association. The court further found the rule, which barred the reporter from physically attending athletic events held at the high school and which restricted his contact with coaches to writing and telephone contact through the main office or athletic office, was a reasonably tailored time, manner, and place regulation that did not restrict all forms of newsgathering access.

STUDENT CONSTITUTIONAL RIGHTS (OTHER THAN RELIGION AND FREE SPEECH)

Search and Seizure

1. Todd v. Rush County Schools, 1998 WL 7352 (7th Cir.).
An Indiana school district decided to require students to submit to a random, unannounced urinalysis before they could participate in any extracurricular program. The Seventh Circuit Affirmed the policy. A critical feature of the policy implemented by the school district is that it requires parental consent to the urinalysis. Upon consent, students are permitted to participate in extracurricular activities as well as drive to school. If a students tests positive, the student and parents are notified. The student is given the opportunity for a retest. The student also is given the opportunity to explain the positive results. If there is no satisfactory explanation, the student is barred from extracurricular activities or driving until passing a retest. The program promises not to subject the student to general discipline (suspension) if the test is positive. Instead the parents are given outside agency referrals for drug counseling.

2. Juan C. v. Cortines, 89 N.Y.2d 659, 657 N.Y.S.2d 581, 118 Ed. Law Rep. 727 (4/1/97).
New York's highest court upheld the one year suspension of a high school student who was searched and determined to have brought a loaded gun to school, despite a prior Family Court ruling that the gun could not be used as evidence in the criminal proceeding because the student had been illegally searched. In a subsequent school disciplinary proceeding, the hearing officer contradicted the Family Court's determination and ruled that the search was legal and admitted the gun into evidence. The Appellate Division had ruled that the Family Court's suppression of the evidence was binding on the school district in the school's disciplinary proceeding. In reversing the Appellate Division, the Court of Appeals found crucial the inability of the school district to participate in the Family Court proceeding to support the validity of the search of the student in the context of "its unique educational responsibilities."

3. Grendell v. Gillway, 974 F. Supp. 46 (D. Me. 1997).
In this case, a sixth grade student was called out of class on several occasions and asked by her guidance counselor and a police DARE officer if her parents used drugs. The officer told her that if she cooperated and told him about her parents' drug use, nothing would happen, but if she didn't cooperate, she would be in a lot of trouble and her parents would be arrested. The student told the police officer that her parents grew marijuana plants and smoked marijuana in the house. When the student got off the bus after school, police cars surrounded her house and she was immediately taken to the police station, where she was placed in locked room and not allowed to tell her mother where she was. The student alleged that the defendants violated her rights to substantive due process by

using her to elicit incriminating information about her parents and by conducting an unreasonable seizure of her person. The court held that the conduct of the police officer in lying to and threatening an 11-year-old girl was shocking to the conscience and violated substantive due process. Even in the absence of precedent, the conduct was so patently egregious that the officer was not entitled to qualified immunity. However, the court found that there were genuine issues of material fact as to whether the officer's separation of the student from her parents and his refusal to let her tell her mother where she was located was a reasonable exercise of his role as community caretaker so as to preclude granting of summary judgment on the question of the lawfulness of the seizure.

4. Jenkins v. Talladega City Board of Education, 115 F.3d 821 (11th Cir.1997), *cert. denied*, 118 S. Ct. 412 (11/10/97).
The court ruled that school officials who allegedly strip searched two second grade girls accused of stealing $7.00 were entitled to qualified immunity in a §1983 action. However, the court stated that the school officials "exercised questionable judgment given the circumstances with which they were confronted."

5. People v. Mesilas, __ Misc.2d __ (Sup.Ct. Nassau Co. 1998).
The Nassau County Supreme Court ruled that a school district acted lawfully when it searched the book bag of a student suspected of having just sold drugs to students on school grounds. Under the particular facts and circumstances of that case, the court determined that the district had enough evidence of drug activity to give it "reasonable suspicion" to conduct a search of the student's book bag. The search disclosed 42 packets of marijuana.

Community Service

1. Immediato v. Rye Neck School Dist., 73 F.3d 454, 64 U.S.L.W. 2443, 106 Ed. Law Rep. 85 (2nd Cir.1996), cert. denied, 117 S.Ct. 60, 65 U.S.L.W. 3249, 3256 (10/7/96).
The United States Court of Appeals for the Second Circuit ruled that a school district may include a mandatory community service program as part of its high school curriculum. The school district implemented a program which required all students to complete forty hours of community service during high school and to discuss their experience in class. The program did not provide for exceptions or "opt-out" provisions for students who objected to performing community service. The court determined that the program was not unconstitutional because the work required was not severe and the nature of the work and the conditions under which it must be performed were not onerous. Furthermore, students who did not wish to participate could avoid the program by attending another private or public school or be a home-schooled student.

2. Herdon v. Chapel Hill-Carrboro City Board of Education, 89 F.3d 174, 65 U.S.LW.2074, 110 Ed. Law Rep.1037 (4th Cir. 1996), cert. denied, 117 S.Ct. 949, 65 U.S.L.W. 3564, 3568 (2/18/97).
The United States Court of Appeals for the Fourth Circuit ruled that a school district's requirement that its students complete 50 hours of community service in order to graduate did not violate the students' rights to privacy, liberty or freedom from involuntary servitude, or their parents' right to direct the upbringing of their children.

3. Appeal of Alexander (West Irondequoit Central School District), 36 Educ. Dep't. Rep. 160 (10/17/96).
The Commissioner of Education ruled that a school district did not have the authority to condition a student's return to school on participation in counseling services or community service. The district suspended a ninth-grade student who brought a knife to school for two months. The Commissioner upheld the suspension, but ordered the district to remove from the student's record the reference to counseling and community service. However, the commissioner noted that a school district may recommend counseling to a student.

4. Appeal of Eddy (Panama Central School District), 36 Educ. Dep't. Rep. 359 (3/19/97).
A ten day suspension imposed on a learning-disabled student for bringing a BB-pellet gun to school and keeping it in his locker was not excessive, even though the student had a clean disciplinary

record, according to the Commissioner of Education. However, the Commissioner ruled that Board of Education had no authority to require the student to perform 20 hours of community service, an additional penalty that it had imposed upon the student. Since the student was classified as learning disabled, the matter had been referred to the district's committee on special education, which found no connection between the incident and the student's disability.

STUDENT DISCIPLINE

1. Appeal of Rosenkranz, 37 Educ. Dep't. Rep. 330 (2/13/98).
The commissioner of education ruled that school officials lacked authority to suspend an 18 year old student who permanently withdrew from school prior to his scheduled disciplinary hearing, since there was no longer a "pupil-school relationship." However, the commissioner observed that should the student ever again attempt to register as a student in the district, the district could pursue a suspension at that time.

2. Appeal of McNamara, 37 Educ. Dep't. Rep. 326 (2/13/98).
In this case, the school district permanently suspended a student from instruction and forever "barred [him] from entering upon school district property for any purpose." The commissioner upheld the permanent suspension from instruction, but set aside the lifelong ban from school grounds, observing: "There is no provision for permanent banishment from school grounds...nor is a disciplinary hearing...a proper forum" for making such a determination.

3. Mazevski v. Horseheads Central School District, 124 F.3d 92 (2d Cir 1997).
In this case, a public school student filed a federal civil rights lawsuit against the school district and certain school officials, alleging that school officials violated his constitutional rights when they dismissed him from the school marching band for missing a band performance without permission. The student claimed that participation in the marching band was a constitutionally protected right, because it was a curricular activity for which he received academic credit, entitling him to full procedural due process protections. The Court ruled in favor of the school district, holding that while the student did have a constitutionally protected right, created by state law, to a public education, he did not have a constitutionally protected right "to any one specific curricular or extracurricular activity, meriting due process."

4. Bd. of Educ. of Monticello CSD v. Commissioner of Educ.,91 NY2d 133 (1997)
A school district's ten day suspension of a student who distributed, on school grounds, a publication that encouraged other students to destroy school property and to engage in acts of insubordination was upheld by the court, overturning a ruling by the Commissioner of Education. The student admitted bringing to school copies of a newspaper style publication he had produced on a home computer, certain portions of which he claimed to have personally written. The newspaper contained vulgar language and encouraged students to urinate on floors, throw garbage about the school courtyard, write graffiti on school walls and smoke in the bathrooms. Moreover, the article noted that the police would be powerless to control the population of more than 1,000 students. The Appellate Division, Third Department found that the suspension did not violate the student's First Amendment rights to freedom of speech and expression because there was sufficient evidence to support the charge that the student's conduct endangered the safety, health and welfare of others. The New York State Court of Appeals unanimously affirmed the decision.

5. Appeal of Alexander (West Irondequoit School District), 36 Educ. Dep't. Rep. 160 (10/17/96).
The Commissioner of Education ruled that a school district did not have the authority to condition a student's return to school on participation in counseling services or community service. The district suspended a ninth-grade student who brought a knife to school. The Commissioner upheld the suspension, but ordered the district to remove from the student's record the reference to counseling and community service. However, the commissioner noted that a district may recommend counseling to a student.

6. Appeal of Eddy (Panama Central School District), 36 Educ. Dep't. Rep. 359 (3/19/97).
A ten day suspension imposed on a learning-disabled student for bringing a BB-pellet gun to school and keeping it in his locker was not excessive, even though the student had a clean disciplinary record, according to the Commissioner of Education. However, the Commissioner ruled that Board of Education had no authority to require the student to perform 20 hours of community service, an additional penalty that it had imposed upon the student. Since the student was classified as learning disabled, the matter had been referred to the district's committee on special education, which found no connection between the incident and the student's disability.

7. Appeal of Douglas and Judy H. (Keshequa Central School District), 36 Educ. Dep't Rep. 224 (11/27/96).
The commissioner of education determined that a school board had the authority to enforce its policy on student athletes which provided that if a student was caught consuming alcohol, the board could require the student to undergo a chemical-use evaluation in addition to a five day suspension. The policy also required attendance at "insight classes" or a 20 week suspension should the student fail to attend the classes. In this case, members of a cheerleading squad who were caught consuming alcohol while attending a championship basketball game, were penalized under the policy and ordered by the board to attend the 10 "insight classes" before they would be eligible to return to the participation in extracurricular activities.

8. Appeal of DeRosa (Rotterdam-Mohonasen Central School District), 36 Educ. Dep't Rep. 336 (2/26/97).
The parents of a student received adequate notice of a suspension hearing concerning their child when they were verbally informed of the hearing and of their right to obtain counsel three days before the hearing by the assistant principal. The parents did not receive the statutory written notice informing them of their right to be represented by counsel, to present witnesses, and to question opposing witnesses, until the day before the hearing. However, the hearing officer afforded the parents the opportunity during the hearing to read the written notice and they were asked whether they had any questions concerning their rights. The parents appealed the suspension, claiming the short notice prevented them from obtaining an attorney. The Commissioner ruled that a single day's notice of a suspension hearing generally would not be reasonable, but that under the circumstances, the three day advance verbal notice to the parents, together with the opportunity afforded them at the hearing to assert their desire for legal representation, constituted reasonable notice.

CASES AFFECTING THE EDUCATION OF CHILDREN WITH DISABILITIES

ADA and Section 504

1. Willamina (OR) School Dist. No. 30-J - OCR Decision, 27 IDELR 221 (5/1/97).
A regional director of the Office of Civil Rights found no evidence that the school district discriminated against a disabled student who was allegedly subjected to verbal and physical abuse by fellow students by failing to take appropriate action in response to the student's harassment claims. The record was unclear as to whether district staff actually received a specific complaint of harassment, witnessed the harassment, or conducted an appropriate investigation of the student's complaint. There was also conflicting evidence as to whether the assault was motivated by the student's disability and whether the district's response to the incident was appropriate.

OCR was concerned, however, about future disability-based harassment of the student and advised the school district it was now on notice there has been frequent disability-based verbal abuse of this student. Therefore, it was obliged to take all necessary steps to address and eliminate such harassment, under Section 504 of the Rehabilitation Act of 1973 and Title II of the ADA. OCR recommended that the school district maintain records of such reports and its responses to them.

2. Hillsborough County (FL) School Dist. - OCR Decision, 27 IDELR 730 (7/9/97).
A regional office of the Office of Civil Rights determined that a school district violated Section 504 of the Rehabilitation Act of 1973 and the ADA when it changed the placement of a student who hit

a teacher to a different high school without first conducting a reevaluation of the student. Section 504 and the ADA require that a school district conduct a reevaluation of a student before it implements a significant change in placement. An expulsion or suspension from school for more than ten consecutive days constitutes a significant change in placement. In this case, the student's placement in the alternative school further constituted a significant change in placement because it did not allow him to receive any hours of instruction in a regular education program even though he had been receiving five to ten hours of regular education at the prior school.

3. Mount Diablo (CA) Unified School Dist. - OCR Decision, 27 IDELR 614 (7/18/97).
A regional office of the Office of Civil Rights determined that a school district did not violate ADA requirements that public schools take appropriate steps to ensure communications with disabled individuals are as effective as communication with others during a class trip to Washington D.C. and New York City attended by a student who is unable to vocalize and communicates through a computer and personal sign language. The student was able to participate in all the scheduled activities and he was provided with a personal assistant. Although the personal assistant was not one of his regular assistants, he was capable of communicating with the student and another teacher on the trip was familiar with the student's method of communication. The student's regular assistants were female. The school district chose to send a male assistant who, although less familiar with the student, was a more suitable roommate to assist the student overnight in the hotel room he would be sharing with other male students.

OCR explained that the ADA standard that individuals with disabilities be afforded communication that is as effective as that provided to others must be interpreted within the context of each situation. A field trip where the educational experience is to hear and see historical buildings, museums, buildings, or a play, does not require that a school district ensure the disabled student can communicate as quickly and accurately as he/she would if the educational experienced depended on the student's ability to communicate, such as a debate tournament.

4. Letter to Durheim - OCR Response to Inquiry, 27 IDELR 380 (12/30/97).
In response to an inquiry, a regional division of the Office of Civil Rights stated that OCR has determined the Section 504 regulations require school districts to obtain parental consent prior to conducting an initial evaluation of a student for the identification, diagnosis and prescription of specific educational services. However, subsequent student evaluations are not subject to parental consent.

5. Dade County (Fl) School Dist. - OCR Decision, 27 IDELR 223 (5/1/98).
A regional director of the Office of Civil Rights determined that a school district denied a student of physical and occupational therapy services as prescribed in her IEP, but did not deny the student an appropriate education with respect to those services. The parent believed that the level of services specified in the IEP should have been higher, but instead of requesting a due process proceeding, the parent denied the therapists access to the student. She also canceled a visit by the physical and occupational therapy coordinator, and did not return to the district a completed physician's referral form for physical and occupational therapy evaluation. Therefore, the school district did not discriminate against the student regarding the provision of these services.

6. Letter to McKethan (OSEP Response to Inquiry), 25 IDELR 295 (12/31/96).
The Office of Special Education Services at the United States Department of Education explained that if the parents of a student with disabilities who qualifies for services under IDEA refuse to accept services offered pursuant to an IEP developed in accordance with the requirements of IDEA, the parents may not require a school district to develop an IEP under Section 504. A rejection of services under IDEA amounts to a rejection of services under Section 504 because the school district complied with Section 504 when it complied with the IDEA requirements.

Appeals and Due Process Proceedings

1. Board of Educ. of the Brentwood UFSD, SRO Decision 97-9 (7/22/97).
New York's State Review Officer ruled that a hearing officer who had annulled an individualized education program because of an improperly convened CSE meeting, and remanded the matter for the CSE to prepare a new IEP with all the required members, should have allowed the student's parents an opportunity to present evidence and confront witnesses with respect to the new IEP. The hearing officer had determined that he did not require additional evidence to determine if the new IEP was appropriate because the new IEP was so similar to the first one. He had been concerned also with the length of a new hearing and delays in the provision of appropriate services to the students, particularly since the previous hearing had taken five days. According to the SRO, the hearing officer denied the parents of the right to challenge the new IEP.

2. Board of Educ. of the Middle Country CSD, SRO Dec. 97-32 (8/20/97).
The New York State Review Officer rejected a parent's argument asking that the school district's cross-appeal be dismissed because the school district had failed to serve a notice of intention to seek review. The SRO ruled that Section 279.2(a) of the Regulations of the Commissioner of Education which requires that a parent or person in a parental relationship to a child with a disability serve a notice of intention to seek review upon a board of education, does not require that a board of education serve a notice of intention to seek review upon a parent. The SRO explained that the purpose of the regulation is to direct the board of education to file the impartial hearing record with the State Education Department.

   The SRO also rejected the parents' argument that the school district's cross-appeal was barred by Section 275.16 of the Regulations of the Commissioner of Education because it had not been commenced within thirty days of the hearing officer's decision. The SRO ruled that regulation applies to appeals to the Commissioner of Education under Section 310 of the Education Law. Appeals to the SRO are governed by Section 279.2(b) of the Regulations of the Commissioner of Education which requires that a petition for review be served "within 40 days after receipt of the decision sought to be reviewed."

3. Devine v. Indian River County School Board, 26 IDELR 751 (11th Cir. 9/5/97).
The United States Court of Appeals for the Eleventh Circuit ruled that IDEA allows parents to bring suits on behalf of their children, but does not afford them the right to represent their child in an IDEA lawsuit. In this case, the parents had brought an appeal before a federal district court. On the second day of trial the parents requested, and the district court denied, permission to discharge their attorney and have the non-attorney father represent the student. Although IDEA allows parents to present evidence and examine witnesses at a due process hearing, there is not indication that Congress intended to carry this right over to a federal court proceeding.

4. Walczak v. Florida UFSD, 1998 WL 177971 (2d Cir. 4/16/98).
In this case, a hearing officer and New York's State Review Officer determined that the IEP and BOCES placement proposed by the school district was appropriate and, therefore, the parents were not entitled to reimbursement. The parents wanted a residential placement. On appeal, a federal district court reversed the SRO's decision, after finding that the BOCES program was inadequate because it did not permit the student to make meaningful educational progress. The school district appealed, arguing that the evidentiary record of the administrative proceedings did not support the district court's finding. The U.S. Court of Appeals for the Second Circuit agreed with the school district and reversed the determination of the lower court.

   In its ruling, the Second Circuit acknowledged that a hearing and state review officers' decisions are subject to judicial review. However, the court explained that such judicial review must be independent and deferential, "mindful that the judiciary generally 'lack[s] the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy" and that although a court is not to rubber stamp administrative determinations, it must conduct an independent review without impermissibly meddling in state educational methodology.

> For judicial review of the IEP challenged in this case [to be both 'independent' and 'deferential,' the district court was required to examine the administrative record, as well as any new submissions by the parties, with particular attention to...whether a preponderance of the objective evidence indicates that [the student] has made progress or regressed in the BOCES day program....A review of objective evidence is easiest, of course, when a disabled child is in a main streamed class. In such circumstances, the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress...Nevertheless, this court has looked to test scores and similar objective criteria even in cases where a disabled child has been educated in self-contained special education classes. In such circumstances, the record must, of course, 'be viewed in light of the limitations imposed by the child's disability.'

The record developed in this case at the administrative proceedings was exhaustive, and the hearing officer and SRO had carefully reviewed all relevant materials in making their ruling in favor of the school district. The district court, on the other hand, "did not point to any objective evidence in the record that led it to reject the administrative officers' conclusions as to the adequacy of the [challenged] IEP." The objective evidence in this case did not establish the inadequacy of the school district's IEP. In this context, the Second Circuit further stated that "the inadequacy of an IEP is not established...simply because parents show that a child makes greater progress in a different program."

In this decision, the Second Circuit also reviewed and restated the basic principles which apply to the education of children with disabilities:

* IDEA requires that school districts provide children with disabilities free appropriate education (FAPE).

* A free appropriate education consists of special education and related services tailored to meet the unique needs of the child and reasonably calculated to enable the child to receive educational benefits.

* IDEA sets forth a preference for educating children with disabilities to the maximum extent appropriate with their nondisabled peers. Therefore, a school district must provide services in the least restrictive environment (LRE) consistent with the child's needs. Even in cases where mainstreaming is not a feasible alternative, the statutory preference for LRE applies.

* The particular educational needs of a child and the services required to meet those needs must be set forth at least annually in a written individualized education program (IEP).

* In assessing the appropriateness of an IEP, a court must determine whether the school district complied with the procedural requirements of IDEA and whether the IEP was reasonably calculated to enable the child to receive educationalb enefits.

* IDEA itself does not set any specific level of educational benefits that must be provided through an IEP. However, the U.S. Supreme Court in Rowley v. Board of Education, 458 U.S. 176 (1982), rejected the notion that an "appropriate education" requires school districts to maximize the potential of students with disabilities.

* Parents wishes to maximize the true potential of their child is understandable, but what IDEA requires is an appropriate education. IDEA does not guarantee an education that provides everything that might be thought desirable by loving parents.

* While some children's disabilities may be so acute as to require a residential placement, school districts must proceed cautiously in considering such a highly restrictive setting.

* It would violate the LRE requirements to move a child from a day program where he or she is making progress to a residential placement merely because a residential facility is thought to offer superior opportunities.

5. Muller v. Committee on Special Education of the East Islip UFSD, 1998 WL 257311 (2nd Cir. 5/22/98).
In this case, the issue concerned whether or not the school district had properly determined that a student was not classifiable as suffering from a serious emotional disturbance. The U.S. Court of Appeals for the Second Circuit acknowledged that federal courts are to give deference to the final decision of state authorities. However, this case did not involve the typical question raised in an IDEA case over the appropriateness of an IEP. Therefore, the court was not bound by the deference standard and was free to consider the issue of the student's classification de novo.

The Second Circuit explained that factual findings of lower courts are reviewed under the "clearly erroneous standard"...and legal conclusions de novo." This case presented a mixed question of law and fact as to whether or not the applicable statutory and regulatory definitions applied to the student's history, which was subject to a de novo review.

6. Board of Educ. of the City School of the City of Ithaca, SRO Dec. 97-61` (2/13/98).
The New York State Review Officer ruled that a hearing officer did not violate the parents' rights when he refused their request that he allow the student's private school teacher to testify by phone at a due process hearing. The attorney for the school district had objected to the testimony. In so ruling, the SRO stated that "[a]lthough there is nothing inherently unreliable about the testimony of a witness who testifies by telephone...each party at a hearing has the right to 'confront' all witnesses."

7. Application of a Child with a Disability (Mount Sinai UFSD), SRO Decision 96-86 (1/13/97).
New York's State Review Officer ruled he had jurisdiction to entertain an appeal from a hearing officer's interim order, provided the order is directly related to a child's educational program or services. In this case, the interim order pertained to the student's "pendency placement" and was, therefore, clearly related to the child's educational program and services.

Assessments

1. Joint Policy Memorandum, 27 IDELR 138 (9/9/97).
The Office of Special Education and Rehabilitative Services (OSERS) and the Office of Civil Rights (OCR) at the U.S. Department of Education issued a joint guidance regarding the inclusion of students with disabilities in state and district-wide assessments. According to the guidance, exclusion from assessments based on disability violate Section 504 of the Rehabilitation Act of 1973 and Title II of the ADA, and IDEA requires that students with disabilities be allowed to participate in such assessments unless the IEP team determines otherwise, explains the reasons for its decision and identifies how the child will be assessed. The guidance further states that Section 504, the ADA and IDEA require that accommodations be provided to those students who need accommodations to participate in general state and district-wide assessment programs. These must be stated in the student's IEP or Section 504 Plan. Possible accommodations include: oral administration, large print, Braille version, individual or separate room administration, extended time and multiple test sessions.

For those students whose IEP specifies they are to be excluded from regular assessments, states are to develop guidelines for alternate assessments, and develop and conduct such alternate assessments beginning not later than July 1, 2000.

Attorneys Fees

1. Cypress-Fairbanks Independent School Dist. v. Michael F., 26 IDELR 303 (5th Cir. 7/15/97).
The United States Court of Appeals for the Fifth Circuit ruled that IDEA does not prevent an award of costs to a prevailing school district, even though attorney fees may be awarded only to prevailing parents. In so ruling, the Fifth Circuit rejected the parents argument that an award of costs to the

school district would be inequitable because it had been the school district who had initiated the appeal after the parents had prevailed in the court below. The parents had also argued that an award of costs to prevailing school district violated the spirit, if not the letter, of IDEA and would have a chilling effect on parental decisions to contest school actions for fear of being penalized with costs even when they have prevailed at an administrative hearing level.

In this case, the school district was able to recover $3,837 expended in connection with witness fees and expenses, the services of a private process server, and the taking of a deposition of a parent expert who was not available for live testimony.

2. J. H. R. v. Board of Education of the Township of East Brunswick, 27 IDELR 486 (N.J. Superior Ct., App. Div. 1/20/98).
The New Jersey Superior Court, Appellate Division affirmed the ruling of a lower state court that the parent of a multiply disabled student was entitled to attorney fees for the legal costs she incurred when a school district challenged the residency of her son. The student lived with his grandparents while his parent lived in a nearby school district. The school district where the grandparents lived sought reimbursement from the parent of the costs of his special education program. The state commissioner of education affirmed a hearing officer's determination that the student resided with his grandparents, and the parent sought attorney fees under IDEA for the legal costs she incurred during the administrative proceedings. A state trial court awarded the parent attorney fees and the appellate division affirmed.

According to the New Jersey Superior Court, Appellate Division, the school district placed the student's right to a free education under IDEA at issue when it joined the parent as a defendant and sought tuition from her. The court noted that one of two school districts was responsible for the cost of the student's education, and the parent could have been spared the necessity of defending a costly administrative proceeding. It rejected the school district's argument that it had not denied the student of an education under IDEA because it had allowed the student to continue attending school during the pendency of the residency proceedings. The court explained that challenges to a student's residency normally do not expose a school district to attorneys fees. However, challenging the residency of a student protected by IDEA may expose a school district to potential fees. The parent was found to be a prevailing party because she had successfully defended the residency challenge. Her prevailing party status was not affected by the fact that she had not been the one to initiate the residency challenge.

3. Shanahan v. Bd. of Educ. Of Jamesville-DeWitt School Dist., 953 F.Supp. 440, 116 Ed. Law Rep. 614, 25 IDELR 304 (N.D.N.Y. 1/21/97).
The United States District Court for the Northern District of New York ruled that the parents of a learning disabled and emotionally disturbed student were prevailing parties entitled to attorneys fees in a case where the school district agreed to place the student at a residential facility during the annual review process, but subsequent to the parents' filing of a request for a due process hearing. The annual review had been prescheduled and the due process hearing had not started at the time of the residential placement. However, according to the court, the parents' request for due process played a catalytic role in "shaping" the discussions and the subsequent actions taken by the district. The court even awarded attorneys fees to the parents for a period of time in which it was unclear, based upon the attorney's billing records, whether the attorney's services were rendered in preparation of the requested hearing or in preparation for the annual review.

4. Leslie "E" v. Bethlehem Cent. School Dist., 25 IDELR 308 (3rd Dep't 1/30/97).
The New York State Appellate Division, Third Department, ruled that the parent of a student with disabilities was not entitled to attorneys fees in a case where the parent had hired an attorney to assist her in getting the school district to change the student's classification and alter his IEP to accommodate his behavioral problems. Although the CSE adopted a number of the demands included in a letter sent by the attorney, the parent never commenced an "action or proceeding" to have any of the student's IEPs reviewed. Regardless of whether the parent may be deemed to have

"prevailed" in her dispute with the CSE, IDEA limits attorneys fees to a parent or guardian who is a "prevailing party in an action or proceeding" brought under IDEA, according to the court.

5. Yankton School Dist. v. Schramm, 93 F.3d 1369, 111 Ed. Law Rep. 1143, 24 IDELR 704, rehearing denied (8th Cir. 8/22/96).
The court affirmed the decision of a lower federal court to award attorneys fees to parents despite the fact that the parents were represented by a publicly-funded attorney, and the school district had made a good faith attempt to comply with IDEA statutes and regulations. In this case, the school district had failed to provide for transition services in the student's individualized education plan (IEP), referring the student's parents, instead to agencies in a position to assist them.

Child Find

1. Doe v. Metropolitan Nashville Public Schools, 27 IDELR 219 (6th Cir. 1/5/98).
In this case, a learning disabled and emotionally disturbed student had attended a private special education school in Nashville until he became 12 years of age and was dismissed from the school. After his dismissal, his parents placed him at a private residential school in Connecticut without any input from the public school district and without the public school's knowledge. A year later, the parents asked the public school district for a meeting to consider their son's educational needs, as well as reimbursement for the costs at the Connecticut school. The school district determined that the student was eligible for special education services, placed him at a local school and refused reimbursement on the grounds that the decision to place him at the Connecticut school had been made without its knowledge or input.

The parents asked for a hearing, seeking reimbursement and arguing that the school district had failed to comply with its child find responsibilities under IDEA. The hearing officer found that the school district's child find efforts were inadequate, but that the parents were not entitled to reimbursement because the parents knew of available services and had failed to act.

A federal district court affirmed, adopting the findings of the hearing officer. The U.S. Court of Appeals for the Sixth Circuit reversed and remanded the case to the lower court after rejecting the school district's argument that the parents' general knowledge of the availability of services precluded them from obtaining reimbursement, as a matter of law. According to the Sixth Circuit, the lower court needed to weigh the extent of the parents' knowledge against the degree of the school district's laxity with respect to its child find responsibilities. It should have performed its own analysis, rather than merely adopting the hearing officer's evaluation.

Civil Rights Liability

1. Hot v. Carmel Central School District et al. 1998 WL 59181 (S.D. N.Y.)
A school district's alleged failure to train personnel to deal with a student's "unpredictable" and ultimately violent behavior did not constitute a civil rights violation according to the Federal District Court for the Southern District of New York. In this case, a student who had previously displayed violent propensities to school district employees was killed by the police after firing a semi-automatic weapon into the home of his girlfriend. The student's parents brought a civil rights claim against the district contending that their son's death resulted from wrongful conduct on the part of school personnel and that this conduct was the result of the district's failure to train personnel in how to deal with their son's problems. In order to successfully bring a civil rights action under a failure to train theory, the individual suing must prove that district officials engaged in wrongful conduct that caused harm and that the wrongful conduct resulted from a failure to train employees that reflected a "deliberate indifference" to an individual's constitutional rights. According to court, to satisfy the deliberate indifference standard, the parents had to prove that district failed to train its employees for a circumstance it knew to a "moral certainty" would arise; that the training would have enabled school personnel to more skillfully deal with the student, and that the anticipated situation is one in which improper handling would frequently result in the deprivation of a citizens constitutional rights. The Court rejected the parent's arguments, concluding that even if they could

prove that school personnel did not respond properly to signs of the student's instability, a school district can not be "expected to provide training directly applicable to the unpredictable conduct of an individual who was highly irrational, highly dangerous to others and self-destructive."

2. Todd v. Elkins School Dist. No. 10, 105 F.3d 663, 25 IDELR 152 (8th Cir. 1/10/97).
The United States Court of Appeals for the Eighth Circuit ruled that the individual defendants in a Section 1983 lawsuit were not entitled to qualified immunity. In this case, the parents of a fourth-grader with muscular dystrophy alleged a violation of Section 504 after their son fell from his unbuckled wheelchair and broke his leg while being pushed by a classmate on an unlevel playground. According to the court, the student had a right to safe transportation in and around the school. This right is clearly established under the law, and the defendants should have known they were violating the student's rights when they allowed an untrained fourth grader to push the student's wheelchair, without buckling his seatbelt, over a rough and uneven field.

Compensatory Education

1. Wenger v. Canastota Central School Dist., 26 IDELR 1128 (N.D.N.Y. 10/3/97).
In this case, a 15-year old student was classified as traumatic brain injured after a car accident in 1991. The student's parents consented to an evaluation in the spring of 1992, and the CSE and the parents agreed on an IEP on May 1992, eight months after his referral. However, the school district was unable to start implementation of the IEP for two months while the student underwent surgery and was transferred between facilities. Upon receiving permission from the student's doctors, the school district began implementing the IEP through the use of BOCES personnel. However, some of the services set forth in the IEP were not provided. The parents requested an impartial hearing. Shortly thereafter, BOCES indicated it would discontinue providing services until the student's doctors provided information concerning the student's medical condition and how services could be provided at optimum conditions. At the hearing, the parents sought three years of compensatory education. The hearing officer ruled that the IEP did not contain sufficient information to allow teachers and service providers to plan appropriate programs for the student, and ordered the CSE to prepare a new IEP. On appeal, the SRO ruled that the school district had failed to provide services in the student's IEP but denied the parents' request for compensatory education and related services.

Upholding the determination of the SRO, the U.S. District Court for the Northern District of New York explained that under the law of the Second Circuit, compensatory education for a child over twenty-one years of age is available only where there has been a gross violation of the IDEA (Garro v. Connecticut, 23 F.3d 734 [1994]). The District Court then went on to determine that even where there has been a gross violation, IDEA does not require an award of compensatory education "equal to the length of time [the student] was denied an appropriate education." According to the court, "'compensatory education is not a contractual remedy, but an equitable remedy...' When considering an equitable remedy, courts must apply a fact specific analysis, and may decide that a generalized award of compensatory education is not appropriate under the circumstances." In this case, the SRO had found, and the court agreed, there was no evidence that the student had regressed as a result of the school district's failure to provide an appropriate education in a timely and consistent manner.

2. Board of Education of the South Glen Falls CSD, SRO Dec. 97-26 (11/4/97).
The New York State Review Officer ruled that a hearing officer lacked jurisdiction to award compensatory education for a period of time during which a student was allegedly denied appropriate educational services because the adequacy of those services and the remedy, if any, had already been the subject of a prior proceeding before a hearing officer who did not order the school district to provide any compensatory education. The SRO agreed with the school district's argument that to allow the second hearing officer in a separate proceeding to make such an award would violate the finality of the first hearing officer's decision.

Damages

1. Wenger v. Canastota Central School Dist., 26 IDELR 1128 (N.D.N.Y. 10/3/97).
The U.S. District Court for the Northern District of New York ruled that a 15-year old traumatic brain injured student was not entitled to monetary damages under IDEA as a result of the school district's failure to provide the student with an appropriate education in a timely and consistent manner. The parents sought $3,500,000. The court ruled that IDEA does not provide for compensatory monetary damages.

   The court then went on to rule that the parents were not entitled to monetary damages under Section 504 either because "something more than a mere violation of the IDEA is necessary in order to show a violation of Section 504 in the context of educating children with disabilities, i.e., a plaintiff must demonstrate that a school district acted with bad faith and gross misjudgment." The court found no evidence that the school district had acted with bad faith or gross misjudgment even though it had failed to timely assess and diagnose the student's disability, and to implement the student's IEP in a timely and consistent manner. Instead, the record showed that the severity of the student's condition often prevented the school district from implementing the IEP.

Exhaustion of Remedies

1. Ajala v. New York City Board of Educ., et al, 27 IDELR 38 (S.D.N.Y. 11/28/97).
The U.S. District Court for the Southern District of New York granted the school district's motion to dismiss the parents' Section 1983 claim because the parents failed to exhaust their administrative remedies under IDEA. In this case, the parents requested a due process hearing on two occasions, but did not attend either hearing. They then started a Section 1983 lawsuit in federal court alleging the district failed to comply with IDEA. The court explained that "[t]he exhaustion doctrine 'prevents courts from undermining the administrative process and permits an agency to bring its expertise to bear on a problem as well as to correct its own mistakes.'" If a parent disagrees with any element of an IEP or other decisions made regarding their child's education, the parent must first seek review through an impartial due process hearing conducted by the local school district, whose decision is subject to appeal to the state educational agency. A parent must exhaust these measures before seeking review in federal or state court, including the commencement of a Section 1983 lawsuit based on an alleged violation of IDEA.

Extracurricular Activities

1. Knapp v. Northwestern University, 101 F.3d 473, 65 U.S.L.W. 2379, 114 Ed. Law Rep. 460 (7th Cir.1996), cert. denied, 117 S.Ct. 2454, 65 U.S.L.W. 3822, 3825 (6/16/97).
The court dismissed an action brought by a student athlete under the 1973 Rehabilitation Act. The school refused to permit the student to play college basketball because the student suffered a sudden cardiac arrest during a pickup game while a senior in high school. The school based its decision on expert opinions that the student would be at great risk if he played basketball. The court determined that the student was not an "otherwise qualified individual with a disability" as required under the law. According to the court, the student was unable to prove that he had a physical "impairment which substantially limits one or more of [his] major life activities." Since the student had access to all other academic services, and the inability to play basketball was only a small portion of college, there was no violation of federal law. Furthermore, since the student's health condition prevented him from meeting all of the requirements of the program, he was not qualified to participate even with reasonable accommodation, according to the court.

Health Related Services

1. Board of Educ. Of the Lynbrook UFSD, SRO Dec. 97-15 (9/23/97).
The New York State Review Officer ruled that the school district did not deny a 12 year-old student with multiple disabilities of a free appropriate public education when it scheduled one 30 minute session of physical therapy a week during his physical education class, in order to eliminate any impact upon his academic classes. In prior years the student had received physical therapy three times a week between 8:00am and 8:30am before the start of the school day, and the parents wished for the student to continue to receive this service outside of school hours. The record showed that not one of the student's IEPs had ever indicated when the physical therapy would be provided to the student. Ruling in favor of the school district, the SRO explained that related services may be provided to a child during normal school hours with care taken to minimize the impact of such scheduling upon the child's academic program. The scheduling of one 30 minute session of physical therapy as a push-in service during the student's physical education class addressed any concern about the loss of educational programming for the child. The SRO also rejected the parents' argument that a student may not be removed from his regular education peers to receive a related service, citing an opinion from the Office of Civil Rights at the U.S. Department of Education that the separation of a child from his/her peers to receive appropriate educational services does not per se violate Section 504 of the Rehabilitation Act of 1973.

2. Cedar Rapids Community School Dist. v. Garret F., 25 IDELR 439 (8th Cir. 1997).
The U.S. Court of Appeals for the Eighth Circuit ruled that the school district was required to provide a 12-year old student who was left quadrapalegic after a car accident with the following health care services while he attended school - urinary bladder catherization, suctioning of tracheostomy, ventilator setting checks, ambu bad administrations as a back-up to the ventilator, blood pressure monitoring, observations to determine if he was in respiratory distress or automatic hyperreflexia and others. In so ruling, the court looked to the U.S. Supreme Court decision in Irving Independent School Dist. v. Tatro, 468 U.S. 883 (1984) and applied the two-step inquiry used in that case to determine first, that the services in question were supportive services necessary for the student to attend school and benefit from his education; and second, that the services were not for diagnostic or evaluative reasons and did not have to be administered by a doctor. Therefore, they were not excludable services. The U.S. Supreme Court has agreed to review this case.

3. Morton Community Unit School Dist. No. 709 v. J.M. et al, 27 IDELR 11 (C.D.Ill. 10/23/97).
The U.S. District Court for the Central District of Illinois rejected a school district's argument that it was not required to provide a nurse or trained individual to monitor a student's life support equipment, suction his airways, and apply his hourly medication during the school day because the services required a skilled pediatric nurse instead of a traditional school nurse.

4. Kevin G. v. Cranston School Committee, et al., 27 IDELR 32 (1st Cir. 11/17/97).
The U.S. Court of Appeals for the First Circuit ruled that a school district was not required to assign a full-time nurse to the student's neighborhood school in order to allow him to attend there rather than another school three miles away from his home which had a full-time nurse. The student suffered from several medical conditions which required that he receive medical care at school, including a full-time nurse. The First Circuit explained that IDEA required the school district in this case to provide the student with a placement which included a nurse on duty full-time. However, it did not impose an obligation on the school district to change its placement of nurses because care was readily available at another easily accessible school.

Impartial Hearing Officers

1. Application of a Child with a Disability (City of Yonkers), SRO Decision 96-50 (11/13/96).
New York's State Review Officer ruled that a school district is obliged to demonstrate an impartial hearing officer has been validly appointed, upon inquiry by the parent as to the manner in which the

hearing officer was selected to conduct the hearing. Simply producing the district's list of hearing officers and the school board's resolution appointing the hearing officer was not enough, even though the resolution referred to his "random" selection. It must be demonstrated that the school district indeed contacts prospective hearing officers on a rotating basis, as required by the Education Law.

2. Application of a Child with a Disability (Canastota CSD), SRO Decision 96-84 (12/9/96).
New York's State Review Officer ruled that there is no requirement either in statute or regulation mandating that the names of hearing officers appear in alphabetical order on a board of education's rotational list of hearing officers. However, the order in which the district had rearranged its list in this case was invalid. In this case, the district has been directed by the State Education Department (SED) to include in its rotational list of impartial hearing officers each of the State certified hearing officers who had indicated to SED that he or she would be willing to serve as a hearing officer within the county where the school district is located. The list provided by SED had been in alphabetical order. The district rearranged the order so that individuals who had prior experience as hearing officers appeared at the beginning of the list. The State Review Officer determined this arrangement was invalid because the applicable regulation requires that the names of hearing officers who have conducted hearings in a school district on or after July 1, 1993 must be placed on the bottom of the district's rotational list in order of the date of their appointment to conduct hearings. The school district's list placed individuals who had previously served as hearing officers for the district ahead of those who had not served.

Individualized Education Plan

1. Board of Educ. Of the City School Dist. Of the City of Rochester, SRO Decision 97-5 (8/14/97).
New York' State Review Officer reversed an impartial hearing officer's decision that the requirement in Commissioner's Regulations directing a CSE to indicate a student's "recommended placement" required a CSE to identify the specific regular education kindergarten in which it proposed to place a seven year old down syndrome student. The SRO disagreed, ruling, instead, that a school district is not legally obliged to identify the specific class within a regular education program in which it intends to place a child.

However, the SRO upheld that portion of the hearing officer's decision which determined that the CSE had failed to identify what type of consultant teacher services would be provided to the child. The SRO explained that the Commissioner's Regulations do not explicitly require that a CSE indicate on a child's IEP whether consultant teacher services will be direct or indirect. However, the Regulations require that students in need of consultant teacher services "...receive direct and/or indirect services consistent with the student's IEP..." In the SRO's view, there is no way in which this requirement can be meaningfully enforced unless the IEP indicates whether the services are to be direct, indirect, or a combination of both.

Least Restrictive Environment

1. Hartmann v. Loudon County Board of Educ., 26 IDELR 167 (4th Cir. 8/7/97).
The U.S. Court of Appeals for the Fourth Circuit reversed a federal lower court decision ruling, instead, that regular education was not the least restrictive environment for an 11-year old autistic student. The student had attended a regular second grade class. The school district proposed placing him in a self-contained autism classroom with mainstreaming for art, music, library physical education and recess. The evidence showed that the student was not making progress in the inclusive environment, and the school district's efforts in providing the student with appropriate supplemental aids and services in the regular classroom were more than appropriate. He had been provided with curriculum modifications, a trained one-to-one aide, training for teachers who worked with the student, and a consultant who specialized in autism. In addition, the student engaged in disruptive behavior including whining, screeching, hitting, biting, and engaging in tantrums. In the court's view, the school district's proposed IEP was appropriate because it provided the student with both

educational benefits and mainstreaming opportunities. The U.S. Supreme Court declined to review this case.

2. Kari H. v. Franklin Special School Dist., 26 IDELR 569 (6th Cir. 8/3/97).
The U.S. Court of Appeals for the Sixth Circuit upheld the school district's proposed placement ruling that an inclusive setting was not the appropriate setting for a 14-year old with a form of severe mental retardation. The record showed that any gains made by the student had occurred in the self-contained special education classroom, not the inclusive setting where she was mainstreamed during music, art, and physical education classes, library time, lunch and recess. In addition, the student would make the "sign" for her special education class but never showed a similar interest in the inclusive setting. Also, she would sign with children in her special education class but not elsewhere. Furthermore, she was a disruptive force and a distraction in the regular education setting even though she was constantly supervised by an individual aide.

Parochial School Students

1. Agostini v. Felton, 117 S.Ct.1997, 65 U.S.L.W. 4524, 119 Ed. Law Rep. 29 (6/23/97).
The U.S. Supreme Court ruled that sending public employees into parochial schools to provide Title I services, including remedial instruction and counseling, does not violate the Establishment Clause of the First Amendment to the United States Constitution. While the court's decision does not require the provision of Title I services on the premises of parochial schools, it permits such a practice under certain circumstances. In so holding, the court reversed its ruling in Aguilar v. Felton, 473 U.S. 402 (1985) and a portion of its ruling in School District of City of Grand Rapids v. Ball, 473 U.S. 373 (1985). The United States Department of Education has issued a guidance for school districts which decide to provide such services on the premises of parochial schools.

2. Russman by Russman v. Sobol, 85 F.3d 1050, 64 U.S.L.W. 2812 (2nd Cir.1996), cert.granted and judgment vacated, 117 S.Ct. 2502, 65 U.S.L.W. 3381, 3851 and 3860 (6/27/97).
A panel of the United States Court of Appeals for the Second Circuit, with jurisdiction over New York, ruled that IDEA requires a school district to provide a consultant teacher and a teacher aide to a disabled student on the premises of a parochial school, and that the provision of such services does not violate the Establishment Clause. The United States Supreme Court vacated the decision and sent the case back to the Second Circuit to reconsider its decision in light of the recent reauthorization of IDEA. NYSSBA, which is representing the school district in this matter, submitted a brief to the Second Circuit on September 22, 1997, and is waiting to hear whether the court will require oral argument on the issue.

3. K.R. v. Anderson Community School Corp., 125 F.3d 1017 (7th Cir. 9/10/97)(*cert. denied* 1998 WL 138974 (U.S.).
After being remanded by the United States Supreme Court in light of the Reauthorization of the IDEA, the court ruled that neither IDEA nor its implementing regulations require a school district to provide an instructional assistant to a disabled student on the premises of a parochial school. The district had offered to provide a full-time instructional assistant at a public school and had continuously provided other services such as speech, occupational and physical therapy at a public school facility, while the student attended the parochial school.

4. Fowler v. Unified School Dist. No. 259, 128 F.3d 1431 (10th Cir 1997).
On remand from the United States Supreme Court, the Tenth Circuit reaffirmed its interpretation that IDEA, prior to the 1997 Reauthorization, required school districts to provide special education services to students voluntarily attending private schools on the premises of such private schools. However, the court also observed that under the new amendments to IDEA, "states need not spend their own money to provide special education and related services to voluntarily placed private school students, and they need not pay the cost of education, including special education and related services, to students to whom FAPE has been offered. Rather, their only obligation is to make

available to such students a proportionate amount of their Federal funds. However, nothing prevents states from voluntarily providing more, from their own funds."

5. Cefalu v. East Baton Rouge Parish School Board, 117 F.3d 231, 119 Ed. Law Rep. 338 (5th Cir. 7/3/97).
The United States Court of Appeals for the Fifth Circuit ruled that a school district is not required under IDEA to provide a sign language interpreter to a disabled private school student on the premises of his private school. Accepting the United States Department of Education's position, the court ruled that the statute imposed no obligation on the district to provide the special education services at the private school when the district had provided an appropriate special education program at the public school. In addition, the court accepted the department's position that IDEA does not require a school district to spend non-federal funds for the provision of special education services to students voluntarily enrolled in private schools, but rather, districts must provide a proportionate share of federal funds to students voluntarily enrolled in private schools.

6. Grumet v. Cuomo, 90 N.Y.2d 57,119 Ed. Law Rep. 603 (5/6/97).
In an unanimous (7-0) decision, the New York Court of Appeals held that the 1994 state law allowing the re-creation of the Kiryas Joel Village School District, "violates the Establishment Clause [of the United States Constitution] by singling out the Village of Kiryas Joel for special treatment and thereby demonstrating impermissible government endorsement of this religious community." The Court of Appeals found especially "problematic" the provision in the law limiting its application to only those municipalities "in existence as of the effective date" of the law. Observing that the "legislative history contains no explanation for this cut-off, and defendants' submissions omit any mention of it," the Court found that "[n]o other group can hereafter do what Kiryas Joel did."

Preschool and Early Intervention

1. Application of the Board of Education of the City School Dist. of the City of New York, SRO Decision 96-79 (2/13/97).
New York's State Review Officer ruled the parents of a preschool child with disabilities were entitled to reimbursement for the cost of tuition at a private preschool program on the basis that the child needed to interact with nondisabled peers in a regular education classroom in order to achieve his IEP annual goals and objectives and the district did not offer such a setting. The school district's CPSE had not recommended that the child be placed either in a regular or special education program; only that the child receive individual speech/language therapy for sixty minutes, twice per week, on a twelve-month basis, and that he have the use of an FM receiver to amplify sounds. The hearing education services were provided to him at the private preschool program, after his nursery program had ended. He received speech/language therapy at the Lexington Hearing and Speech Center. The school district argued that it was not required to provide regular education instructional services to preschool children.

The child's evaluators at the Lexington Hearing and Speech Center had recommended that the child be placed in a regular education nursery school. His hearing education services teacher was of the opinion that the child's instruction in the regular education nursery school class had been an essential component of his education, and the speech/language therapist testified the boy's exposure to non-disabled children was necessary for him to derive the full benefit of his speech/language therapy. Therefore, the CPSE's recommendation that only related services be provided was inappropriate. In addition, the parents had cooperated with the CPSE and expressed their dissatisfaction to the CPSE. Because the school district's program was inappropriate, the child was making progress at the private preschool program, and equitable considerations supported the parents' claim, they were entitled to reimbursement.

Procedure

1. Appeal of a Student with a Disability (Commack Union Free School Dist.), 36 Educ. Dep't Rep. 152 (10/7/96).
The commissioner of education ruled that a school district attorney's presence at a CSE meeting was not improper because the meeting involved the resolution of a critical legal issue. The legal issue in the case was review of an IEP that included a behavior modification plan and assistive technology evaluation ordered by a hearing officer at an earlier impartial hearing. The commissioner noted that federal regulations specifically permit districts to invite non-CSE members to CSE meetings.

Reimbursement to Parents

1. Schoenfeld v. Parkway School District, 27 IDELR 846 (8th Cir. 3/9/98).
The U.S. Court of Appeals for the Eighth Circuit ruled that the parents of a student with an anxiety disorder were not entitled to reimbursement for tuition costs at a private school because of their failure to notify the district of their concerns prior to enrolling the student at the private school. According to the court, reimbursement is appropriate only when a public school placement pursuant to an IEP fails to meet a student's needs in violation of IDEA. In this case, the school district was never given an opportunity to design an IEP for the student based on his individual needs. Therefore, it could not be shown that it had an inadequate plan under IDEA.

Parents are entitled to reimbursement of expenses incurred in the education of their disabled children if the program provided by the public school district is inappropriate, the program selected by the parents is appropriate, and equitable considerations support a claim for reimbursement. School Committed of the Town of Burlington, Mass. v. Dept. of Educ. of Mass., 471 U.S. 359, 23 Ed. Law Rep.1189 (1985). Parents of a student with disabilities are not barred from seeking reimbursement for the cost of a private school placement where the private school is not approved by the state, although the cost of the school must be reasonable, Florence County School Dist. Four v. Carter, 510 U.S. 7, 86 Ed. Law Rep. 41 (1993), as compared with the cost of an appropriate placement at a school on a state's list of approved private schools, OSEP Memorandum 94-14, 20 IDELR 1180 (1/21/94).

2. Board of Education of the City School Dist. Of the City of New York, SRO Dec. 97-92 (4/98).
Under the Reauthorization of IDEA, reimbursement may be awarded to the parents of a child with a disability who has previously received special education and related services under the authority of a public agency if the public agency has not offered a free appropriate public education to the child, and the parents of the child enroll the child in a private school. In this case, the student reportedly had never attended public school or received services from the school district. Therefore, the school district argued that his parents were not entitled to reimbursement.

The New York State Review Officer determined that the parents had commenced their due process proceedings prior to the effective date of the Reauthorization of IDEA. Therefore, he was not reaching the question of whether Reauthorization has limited the authority of a hearing officer to grant relief under the Burlington and Carter decisions.

3. Borough of Palmyra Board of Educ. v. F.C. et.al., 28 IDELR 12 (D.C.N.J. 4/22/98).
In granting a motion for injunctive relief, the U.S. District Court in New Jersey ruled that the parents of a student with attention deficit hyperactivity disorder were likely to succeed on the merits of their claim that they were entitled to reimbursement under Section 504, because the school district's accommodation plan for the student was inappropriate and the services he was receiving at a private school were inappropriate. An administrative law judge had determined that the Section 504 plan was seriously deficient because it failed to address the impact of the student's disability on his written and organizational skills.

The district court relied on language in the regulations implementing Section 504, which require that a school district provide qualified handicapped students with a free appropriate education which "may consist either of the provision of free services or, if the recipient places a handicapped person

in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program" (34 C.F.R. §104.33[c][1]).

According to the district court, the regulation requires that a school district either provide free services or place qualified handicapped students in an out-of-district program and pay for the costs of the out-of-district program. If a school district "fails to provide both a FAPE and a private placement, then appropriate remedy must be available to the Section 504 beneficiary. If the placement in the private school is needed to provide the student with a FAPE, because the in-school program fails to comply with Section 504 and its regulation, the Board must bear the cost of providing a program complying with the law.

In its decision, the district court referred to another decision with a similar outcome from a federal district court in Pennsylvania - Christen G. v. Lower Merion School Dist., 919 F.Supp. 793 (E.D. Pa. 1996).

4. Still v. DeBuono, 101 F.3d 888, 114 Ed. Law Rep. 743, 25 IDELR 32 (2nd Cir. 12/5/96).
The United States Court of Appeals for the Second Circuit ruled that the parents of an autistic infant were entitled to reimbursement of expenses related to the hiring of teachers who where not qualified by the state to provide the child "applied behavioral analysis" therapy (ABA). In this case, the city of New York had been unable to provide the services because of a shortage of licensed providers in the state to provide ABA services to children three years of age and under. The Second Circuit acknowledged that Part H of IDEA requires that early intervention services be provided by qualified personnel. However, applying the 1993 United States Supreme Court decision in Florence County School Dist. Four v. Carter. (510 U.S. 7 (1993)) the Second Circuit ruled that it was consistent with the remedial purposes behind the statute to read an exception into that provision in cases where the services in question were not delivered due to a shortage of licensed providers in the state.

5. Phillips v. The Board of Educ. of the Hendrick Hudson School Dist., 949 F.Supp. 1108, 115 Ed. Law Rep. 838, 25 IDELR 500 (S.D.N.Y. 1/3/97).
The court ruled that the equitable principle of laches precluded the parents of a learning disabled student from obtaining reimbursement of tuition costs at a private school for her first three years there. The parents had complained to the district several times regarding the student's educational program, but did not file a complaint via due process until almost five years after the private placement. According to the court, mere notice of dissatisfaction did not constitute a formal complaint. In addition, the parents had consulted with an attorney, and were on notice of their due process rights. Therefore, their delay in bringing the claim was unreasonable. It also prejudiced the school district which did not have an opportunity to develop an appropriate program for the student and was placed in a position of having to defend IEPs created years before.

Stay Put

1. Kari H. v. Franklin Special School Dist., 26 IDELR 569 (6th Cir. 8/13/97).
The United States Court of Appeals for the Sixth Circuit ruled that the stay-put provision of IDEA does not apply during appeals to the circuit courts. Rather it applies only to due process hearings, state administrative review, and civil actions for review brought in either state or federal court. Although an appeal is part of a civil action, the language of IDEA makes reference only to actions in those three forums. In addition, the purpose of stay-put, as explained by the United States Supreme Court in Honig v. Doe, 484 U.S. 305, 323 (1988), is to protect children from unilateral displacement by school authorities or a multi-disciplinary team pending completion of review proceedings. This purpose is not implicated once a district court has approved a school district's proposed change in the child's placement because, at that point, the change is not the result of unilateral action by school authorities.

2. Board of Education of the Canastota CSD, SRO Dec. 97-73 (11/20/97).
The New York State Review Officer ruled that after June 30, 1997 the school district was not required to continue to provide the student with services during the pendency of the proceeding

because the student had turned 21 years old on February 1997. The SRO explained that a student is eligible to receive special education services until age 21 and that, under New York's Education Law, a student with a disability who becomes 21 years old between the months of September and June is entitled to continue his/her educational program until June 30, or the termination of the school year. Once a child reaches the age at which he/she is no longer entitled to the protection of IDEA, the pendency provision, which is intended to prevent the child from losing benefits, looses its rational. The SRO further stated that if it is ultimately determined that a child did not receive a free appropriate public education during the time he/she was eligible for services, the appropriate remedy would be an award of compensatory education.

3. Board of Education of the Northeast Central School Dist., SRO Dec. 97-76 (12/97).
In this case, a hearing officer had issued an interim order directing the school district to pay for private school tuition for the first half of the 1997-1998 school year and the second semester, if necessary, during the pendency of a due process hearing commenced by the parents to challenge the student's proposed placement. The hearing officer determined that the private school had become the student's pendency placement as a result of a prior decision from the New York State Review Officer awarding the parents reimbursement for the 1995-1996 school year.

The SRO reversed the decision of the hearing officer. A child's current education placement for stay-put purposes means the last mutually agreed upon placement at the moment when a due process proceeding is commenced. In this case, it was the 1993-1994 IEP placement. With respect to the impact of his prior decision on the pendency placement of the student involved, the SRO explained that the prior decision was made in the context of a reimbursement claim, and the U.S. Court of Appeals in Zvi v. Ambach, 694 F.2d 904 (2d Cir. 1982), ruled that an impartial hearing officer's decision ordering the payment of reimbursement does not constitute a change in placement, and does not change a child's pendency placement. Furthermore, by definition, a free appropriate public education provided by the public schools must meet the standard of the state educational agency, even though a unilateral parental placement does not need to meet those standards for reimbursement purposes. In his prior decision, the SRO did not and could not have directed the school district to place the child in an unapproved school.

4. Board of Education of the Wappingers Central School Dist., SRO Dec. (12/97).
The outcome of this case was similar to the decision in Board of Education of Northeast Central School Dist., SRO Dec. 97-76 above. What is noteworthy is that the last agreed upon placement for the child was the 1988-1989 IEP placement. The SRO focused on the type of program identified in that IEP, which was a regular public school placement with resource room services. The student had received those services without any parental challenge.

5. Board of Education of the Hyde Park CSD, SRO Dec. 97-77 (12/11/97).
The New York State Review Officer ruled that the student's pendency placement was the unapproved private school the district had agreed to pay for as part of a settlement agreement involving a reimbursement claim. As part of the agreement the school district was to find an approved private school for the student. The agreement contained no time limitation. Given that the agreement was reached on April 1997 when the 1996-1997 school year was almost over, the SRO determined that it was unlikely to expire at the end of that school year. Therefore, the pendency placement was the private school.

In so ruling, the SRO distinguished the decision from the U.S. Court of Appeals for the Second Circuit in Zvi D. v. Ambach, 694 F.2d 904 (2nd Cir. 1982) where the court noted that the local CSE had never determined that the private school was an appropriate placement, and neither the written agreement nor the hearing officer's decision determined that the private school placement was appropriate. Also, the agreement was limited in duration. In this case, the SRO had issued a prior decision awarding reimbursement after determining that the school district had not met its burden of proving its placement was appropriate and the parents had met their burden of establishing that the services at the private school were appropriate. The agreement contained no time limitation. Also citing Evans v. Board of Education Rhinebeck CSD, 921 F.Supp 1184 (S.D.N.Y. 1996), the SRO

ruled that absent such limitation, the placement which the school district had agreed to pay for became the child's pendency placement.

6. Letter to Steinke (OSEP Response to Inquiry), 25 IDELR 533 (2/26/97).
The Office of Special Education Programs at the United States Department of Education explained that where a school district places a student in a private school for evaluation purposes and a specified period of time to determine if it is an appropriate placement, the private school becomes the student's stay-put placement if the parents contest the school district's proposal to change that placement after the end of that period. However, the private school would not become the stay-put placement in circumstances where the school district would place a student in a private school for assessment purposes on a temporary basis of less than 10 days, since this would not constitute a change in placement.

8. Application of a Child with a Disability (New York City), SRO Decision 96-83 (3/4/97).
New York's State Review Officer ruled that the district was not required to pay for the private school tuition costs for a learning disabled student just because the student's parents had been entitled to such reimbursement for the two preceding school years. In so ruling, the State Review Officer rejected the parents reliance upon the Third Circuit's decision in *Susquenita School Dist. v. Raelee S.*, discussed above. Relying instead on the Second Circuit's decision in *Zvi D. v. Ambach*, 694 F.2d 904 (2nd Cir. 1982), the SRO observed that implicit in the maintenance of the status quo under the pendency provisions is the requirement that the school district continue to finance an educational placement which it made, and the parent agreed to, prior to the parent's request for a hearing. In this case, the CSE had never determined that the private school was appropriate for the child, and the school district had not agreed to pay for the child's tuition in that school. Therefore, stay-put provisions did not require school district to pay for the child's tuition at the private school during the pendency of the proceeding to review the CSE's current IEP recommendations.

Student Classification

1. Board of Educ. of the Middle Country CSD, SRO Dec. 97-32 (8/20/97).
The New York State Review Officer ruled that a 13 year-old student with a history of truancy, tardiness, aggressive behavior, and difficulty completing homework should have been classified as emotionally disturbed even though the student did not exhibit the characteristics of an emotionally disturbed child set forth in Section 200.1(mm)(4) of the Regulations of the Commissioner of Education. According to the school psychologist, the student's anger, strained relationship with his mother, and sense of inadequacy could contribute to his truancy, tardiness and his failure to complete homework. In her view, the student was not emotionally disabled because he continued to achieve academically at the appropriate grade level. However, his anger at home interfered with his ability to practice in homework what he learned in school, and caused him to miss a learning opportunity if it caused him to miss class. The SRO agreed that the student did not meet the criteria for emotionally disturbed because he had not manifested any of the characteristics in school over an extended period of time. However, the child's clearly inappropriate behavior toward his mother had persisted over an extended period of time and that behavior impacted upon the student's ability to perform in school at a level consistent with his ability. Therefore, the student met the criteria for classification.

2. Springer v. The Fairfax County School Board, 27 IDELR 367 (4th Cir. 1/23/98).
The U.S. Court of Appeals for the Fourth Circuit ruled that a student's misbehavior, which included truancy, drug use and theft, was not consistent with the classification of serious emotional disturbance. Rather, it was consistent with a diagnosis of social maladjustment which, alone, did not qualify the student as seriously emotionally disturbed.

3. Board of Education of the City of New York, 28 IDELR 253 (3/9/98).
In this case the parents of a student with weakness in perceptual motor skills challenged the school district's decision not to classify the child as a student with a disability. The parents argued, in part, that their procedural rights had been violated because the CSE had made no provision to have the

child's private school teacher present at the meeting, and no members of the CSE had actually met with or tested the student.

The New York State Review Officer ruled that if a child does not attend a public school a school district may determine whether the teacher will participate in the meeting. Thus, in this case, the school district was free to designate one of its special education teachers to serve as the child's teacher member of the CSE. In addition, there is no requirement that any member of a CSE evaluate a child. A CSE may make its recommendation after its members have reviewed the results of the child's evaluation by others.

The SRO also rejected the parents' contention that the CSE should have consulted with the school psychologist who evaluated the child prior to making its recommendation. The SRO explained that the evaluation was considered by the CSE and that another school psychologist who served as a member of the CSE was capable of explaining the significance of the findings by the school psychologist who had actually evaluated the child.

Student Discipline

1. Board of Education of the Averill Park CSD, SRO Dec. 97-64 (1/27/98).
The New York State Review Officer ruled that an IDEA due process hearing was not the appropriate forum for contesting that a student was disciplined twice for the same misconduct. Such an argument is more appropriately addressed in an appeal to the Commissioner of Education under Section 310 of the Education Law. An IDEA due process hearing is not the appropriate forum either for challenging the accuracy of a student's record. Hearings for that purpose are conducted under the Family Educational Rights and Privacy Act (FERPA). Moreover, a hearing officer's decision in a FERPA case is now reviewable by the SRO.

2. Application of a Child with a Disability (Hermon-DeKalb CSD), SRO Dec. 97-72 (2/98).
The parents of a fifteen year old student who had become traumatic brain injured after a car accident in 1994 appealed to the New York State Review Officer from two separate hearing officer decisions. The first appeal involved the appropriateness of the student's proposed placement at a 6:1+1 special education class at BOCES for the 1997-1998 school year. The second appeal concerned a hearing officer's decision authorizing the school district to place the student at the proposed BOCES placement as an interim alternative educational setting for 45 days based on the student's dangerous behavior.

The SRO determined that the BOCES placement was not appropriate because of deficiencies in the student's IEP regarding his annual goals. In addition, the CSE chairperson testified that he was not familiar with the BOCES class, and the BOCES supervisor testified that he had not seen the student's IEP at the time he said there was a space available for the student at BOCES.

During the pendency of the appeal, the school district had scheduled a third hearing to continue the student's placement at BOCES on an interim basis for an additional 45 days. The SRO ruled that his decision determining that the BOCES placement was not an appropriate placement for the child would invalidate any decision that BOCES was an appropriate interim alternative setting. In his ruling, the SRO made no statement regarding a school district's ability to go to additional hearings to extend an interim alternative setting beyond the original 45 days.

3. Gadsden City Board of Educ. v. B.P., 28 IDELR 166 (N.D. Ala. 5/4/98).
The U.S. District Court for the Northern District of Alabama ruled that the expedited hearing mechanism set forth in the Reauthorization of IDEA for removing students to an interim alternative educational setting based on the dangerousness of a student does not prevent a school district from going to court to obtain an injunction. In this case, two 14-year-old students with mental retardation caused a serious disruption to the classroom. They were yelling, cursing, destroying property, fighting, throwing things, and generally out of control. The school district went to state court and obtained a temporary restraining order preventing the students from coming back to school. Prior

to a preliminary injunction hearing, the parties entered into an agreement pursuant to which the students were placed on home instruction. Thereafter, the students went to federal court arguing that the Reauthorization of IDEA precluded school districts from going to court to get injunctive relief under Honig v. Doe, 484 U.S. 305 (1988). The district court rejected the students' argument, explaining that the expedited hearing provisions of the Reauthorization of IDEA provide that "school personnel 'may' seek an expedited hearing if they 'maintain that it is dangerous for the child to be in the current placement... §1415(k)(7)(C)... Congress's use of the permissive term 'may' indicate that resort to such a hearing is optional." In addition, "the unique circumstances surrounding a particular case may still make an expedited hearing inadequate. In some cases,...school officials may need immediate authority to enjoin a child who is scheduled to return to school."

4. Commonwealth of Virginia Department of Education v. Riley, 106 F.3d 559, 65 U.S.L.W. 2530, 116 Ed. Law Rep. 40 (4th Cir. 2/5/97).
The court ruled that IDEA does not require the provision of a free appropriate public education (FAPE) to handicapped students expelled or suspended for criminal or other serious misconduct wholly unrelated to their disabilities. IDEA requires only that all students with disabilities be provided with a right to FAPE, and such right is susceptible of forfeiture.

Note: The ruling of this case has been superseded by the reauthorization of IDEA which specifically provides that FAPE must be provided to all students with disabilities, including children with disabilities who have been suspended or expelled from school.

5. Morgan v. Chris L., 106 F.3d 401, 116 Ed. Law Rep. 39, 25 IDELR 227 (6th Cir. 1997), cert. denied, 117 S.Ct. 2448, 65 U.S.L.W. 3813, 3814 (6/9/97).
The court ruled that a district's actions in filing a juvenile petition against a student with ADHD after he committed an act of vandalism on school property did not comply with the procedural and substantive requirements of IDEA. According to the court, the district failed to develop an appropriate intervention plan, despite his long history of behavior problems and failing grades. In addition, the filing of the juvenile petition triggered an invalid change in placement. Note: This decision has been superseded by the reauthorization of IDEA.

6. Applications of a Child with a Disability (Kenmore-Tonawanda UFSD), SRO Decisions 96-55 and 96-66 (11/20/96).
New York's State Review Officer ruled that a school district did not institute a change in placement in violation of state and federal laws regarding the provision of a free appropriate public education when it referred a child to the PINS Diversion program or by subsequently initiating a PINS proceeding against the child because of her poor attendance. The SRO explained that a change in placement involves a substantial or material alteration of a child's educational program. In this case, there was no change in the child's educational program. Neither was there any indication that Family Court intended to change any aspect of the child's educational program without consulting the school district's CSE. However, before initiating the PINS petition, the school district should have attempted to resolve the child's truancy problem through the CSE process and review of the child's program and the appropriateness of her placement.

Student Medication

1. Davis v. Francis Howell School District, et al., 27 IDELR 811 (8th Cir. 3/12/97).
The U.S. Court of Appeals for the Eighth Circuit affirmed the ruling of a federal district court that a school district did not violate Section 504 or the ADA when the school nurse refused to continue to administer a student's medication after she determined that the student's dosage was in excess of the recommended daily dosage. The court ruled that the school district's refusal to administer the medication was based on its policy of administering medication in compliance with the recommended daily dosage, and safety and liability concerns rather than the student's disability. The policy applied to all students. The school district accommodated the student by allowing the parents or a designee to come to the school and administer the student his medication. In the court's view, a waiver of the policy would have been an unreasonable accommodation because it would impose on the school

district an undue financial and administrative burden by requiring it to determine the safety of the dosage and the likelihood of future harm and liability in each individual case.

Student Placement

1. Board of Education Of the Onteora CSD, SRO Dec. 97-34 (10/6/97)
A multiply disabled student with chemical sensitivities stopped attending school. Prior to that time, she had been enrolled in special education classes, but was also receiving home instruction to compensate for her absences. Her physician indicated that the student was sensitive to multiple chemicals, had tested positive to one form of fungi, and suffered from allergies to the pollen of certain tress and grasses, household dust and several foods. A separate physician informed the CSE that the student had a wide variety of symptoms involving her respiratory, gastrointestinal, musculosketal, central nervous and immune systems. The CSE chairperson arranged to have the public school building tested by a BOCES environmental coordinator who reported that there were no substantial differences between the airborne fungal conditions inside and outside the school building, and that three classroom tested appeared to be adequately supplied with fresh air even though one of them needed to be tested further. The CSE recommended that the child be returned to school for certain classes and services, and receive additional instruction at the school district's learning center.

   At a due process hearing, the student's advocate challenged the environmental testing report and asserted that the child had a history of having severe reactions upon entering the building. Therefore, the CSE's recommendation that she return to school was inappropriate. The hearing officer rejected the argument that the student's return to school would be inappropriate. He noted that the child was exposed to many airborne contaminants at home, and directed the school district to take steps to minimize the student's exposure to contaminants in the air including, for example, precluding students from wearing makeup or perfume in school. On appeal, the SRO upheld the CSE's recommendation after finding that most of the sensitivities which had been identified by the student's physician were to substances which occur in the outside air, as well as in any inside space such as a school, and that the child's physician had not identified any substances which the child must avoid. The SRO also directed the school district to take steps to accommodate the student's allergies and chemical sensitivities.

2. D.B. v. Ocean Township Board of Education, 27 IDELR 151 (D.C.N.J. 11/21/97).
The U.S. District Court for New Jersey set forth a nine factor test to be used when determining whether a residential placement is appropriate and provides the student with an education in the least restrictive environment. These include:

   * whether the school district has attempted to include the student to the maximum extent possible;

   * the educational benefits in a local placement as compared to the benefits of a residential placement;

   * the effect of inclusion on the education of classmates;

   * whether the child has physical or mental conditions which prevent the child from learning in a district placement;

   * whether the child's behavior limits his/her ability to learn in a district placement or whether the child has been regressing to the point where he/she cannot learn in a district placement.

   * whether any professional exposed to the child through work, therapy, or other activities, recommend a residential placement for educational purposes;

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- whether the child's potential is incapable of being realized except through a residential placement;
- whether past experience has led to the conclusion that a residential placement is necessary; and
- whether the residential placement is required for the student to make educational progress.

In this case, the court noted that the parents' primary reason for seeking a residential placement appeared to be for non-educational reasons, namely respite care. Accordingly, the court concluded that the school district's proposed IEP provided the student with a free appropriate public education in the least restrictive environment.

3. Mrs. B. v. Milford Board of Educ., 103 F.3d 1114, 115 Ed. Law Rep. 324, 25 IDELR 217 (2nd Cir. 1/10/97).
The United States Court of Appeals for the Second Circuit ruled that a school district was responsible for the entire cost of the residential placement of a learning disabled student who had been placed at a residential facility by the Department of Children and Youth Services (DCYS), rather than the school district. DCYS placed the student at the Devereux School after the school district rejected its suggestion for a residential placement. The student's IEP reflected that the residential placement would be arranged through DCYS, and the Devereux School listed the student as a child admitted for non-educational reasons. While the student was at Devereux, the school district recommended that she be transitioned back into a public school program. The parent agreed but asked that the student remain at Devereux for the remainder of the school year. The school district agreed to pay for the academic component but not for the costs associated with the residential component because the student had been placed at Devereux for counseling and behavior modification in response to her emotional and psychological problems, rather than reasons related to her education. At the due process hearing, the hearing officer concluded that the student should not be transitioned back to the school district for another year but determined the school district was not responsible for the full costs of the residential placement. On appeal, a federal magistrate ruled that the student's educational and non-educational problems were "sufficiently intertwined such that her educational problems cannot be separated" from the educational ones, and that the residential placement was necessary for the student's educational progress. The federal district court adopted the decision of the magistrate. The Second Circuit affirmed after finding that the evidence showed the student's behavior was regressing, her failure to advance academically was due primarily to her severe emotional problems, and these could not be addressed effectively outside a residential setting.

Transportation

1. North Allegheny School Dist. v. Gregory P., 25 IDELR 297 (12/24/96).
In a case involving a hearing-impaired student who lived part-time with his mother who resided within the school district and part-time with his father who resided outside the district, a Pennsylvania state court ruled the school district was not required to provide the student with transportation to and from school on the days he lived with his father. According to the court, the additional transportation requested did not serve to address the student's special education needs, but only to accommodate the particular domestic arrangement that his parents had made.

to the county's 911 emergency dispatch. He identified himself as the school principal and reported that a vehicle had been parked overnight on district property and that the same vehicle had committed other infractions on district property in the past. When a State Trooper arrived at the school to investigate, the principal deliberately gave the Trooper the license plate number of the woman involved in his personal property dispute. He asked the Trooper to simply provide him with the name, address and telephone number of the vehicle's owner, so that he could handle the problem himself. His efforts to learn the woman's name and address backfired, because the Trooper refused to provide the information and contacted the owner of the vehicle himself instead. When the Trooper spoke with the vehicle's owner, she informed him that she was engaged in a legal battle with the principal concerning a right-of-way over his lake front property, and convinced him that she had never been to the school building where principal said her vehicle had been parked overnight. School district officials learned of the incident when the woman filed a notice of claim against the district for "malicious harassment and abuse of process," based upon the principal's conduct. Initially, the district chose not to file section 3020-a charges against the principal, but proposed that he pay the fine of $11,027, an amount equal to 15% of his annual salary. When he refused, the district commenced 3020-a charges against him, seeking the same fine upon a determination of guilt following a 3020-a hearing. While disputing some of the facts as characterized, the principal admitted to an "exercise of bad judgment" but contended that a letter of reprimand in his personnel file would be a sufficient penalty under the circumstances. The hearing officer disagreed, and concluded that the fine proposed by the district was appropriate to the offense, whereas a "mere letter of reprimand...would be disproportionately lenient for the proven misconduct and insufficient to deter future misconduct."

Employees Who Lie May be Subject to Stiffer Penalties

1. LaChance v. Erickson, *et.al*. 118 S.Ct. 753 (1998)
The United States Supreme Court ruled that employees who lie while being investigated for misconduct in connection with their federal jobs can be given stiffer penalties by the agencies for which they work. According to the Supreme Court, the Unites States Constitution does not prevent additional punishment for people who lie. In the opinion of the court, an employee may remain silent by invoking the Fifth Amendment right against self incrimination, or may simply answer a question honestly, but employees do not enjoy any Constitutional right to lie to federal agency investigators without consequences. Although the court's decision dealt with federal employees, that part of the court's ruling which decries the existence of any Constitutional right to lie could also apply to state and local employees. The case is worth a second look by school districts confronted by employees who lie during the course of disciplinary investigations.

EMPLOYMENT DISCRIMINATION

Procedure

1. Fisher v. Vassar College, 114 F.3d 1332 (1997) pet. for rehearing denied 118 S.Ct. 1341 (1998).
The Second Circuit Court of Appeals held that when an employment discrimination plaintiff has made out a prima facie case of discrimination, and the fact-finder has determined that the employer's non-discriminatory explanation is false and found for the plaintiff, an appellate court may still review the ultimate finding of discrimination for clear error. This case involved a woman who alleged that she was denied tenure in a college biology department because of her marital status and age, in violation of the 1964 Civil Rights Act and the ADEA. The college argued that she did not meet the posted standards for tenure and that she was less qualified than other candidates who filled the specific needs of the department. The district court found that the non-discriminatory reasons proffered by the college were pretextual. According to the court however, a finding of pretext does

not insulate the ultimate finding of discrimination from appellate review. The court stressed that once the presumption of discrimination created by the plaintiff's prima facie case is lost due to the employer's proffer of a non-discriminatory reason, a showing that the employer's reason was false does not prove that the real reason was discriminatory. According to the majority of the court, "the fact that the employer is hiding something does not necessarily mean that the hidden something is discrimination." To permit a plaintiff to win a judgment upon a finding of pretext, without subjecting that judgment to clear error review, would impermissibly shift the burden of proof to the defendant to disprove discrimination or to offer evidence of a "third" reason.

2. Robinson v. Shell Oil Co., 117 S.Ct. 843, 65 U.S.L.W. 4103 (2/18/97).
The United States Supreme Court ruled that employers who retaliate against "former" employees for filing discrimination charges can be sued under Title VII of the Civil Rights Act. This decision casts aside widely accepted case law holding that employees could not file retaliatory employment discrimination lawsuits under Title VII unless they were "currently" employed by the employer they were suing. In this case, a terminated employee filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that he was fired because of his race. While the EEOC complaint was pending, the terminated worker applied for a position with another company, which contacted his former employer for a job reference. The former employer allegedly provided an unfavorable reference and the employee sued, claiming that the unfavorable reference was given in retaliation for the pending EEOC charge. The Supreme Court concluded that denying employees the right to sue "former" employers who retaliate against them for exercising their lawful right to challenge what they believe to be discriminatory firings, contradicts the purpose of the law and give employers a "perverse incentive ...to fire employees who might bring Title VII retaliatory claims."

3. Simon v. Safelite Glass Corp., 128 F.3d 68 (2d Cir. 1997).
The court ruled that an employee who receives Social Security benefits was precluded, under the doctrine of "judicial estoppel," from suing his employer under the Age Discrimination in Employment Act (ADEA). In this case, an employee with severe hearing and vision problems sued his former employer, claiming that it had discriminated against him on the basis of his age, when it terminated him and refused to rehire him while simultaneously hiring younger persons for positions for which he claimed to be "fully qualified." After being terminated, but prior to suing his former employer, the employee began receiving Social Security disability benefits based on an application in which he stated, under penalty of perjury, that he "became unable to work because of his disabling condition." The former employer asked the court to dismiss the age discrimination claim against it, arguing that the former employee's sworn statement on his Social Security application that he was "disabled" and "unable to work" should prevent him from arguing that he was qualified to hold his previous job. The court agreed, and dismissed the employee's claim under ADEA. However, the court noted that its decision did not specifically address the question of whether an employee would be prevented from bringing suit under the ADA under similar circumstances.

4. Mitchell v. Washingtonville Central School District, 992 F.Supp. 395 (1998).
An employee who claimed "total disability" for purposes of receiving Social Security Disability benefits was not entitled to a "reasonable accommodation" in the workplace pursuant to the Americans with Disabilities Act (ADA), according to the Federal District Court for the Southern District of New York. In this case, within four months of acquiring his job, a head, school district custodian, who was an amputee, began to experience pain and swelling in the remaining portion of his amputated limb. He became unable to wear his prosthesis and was unable to work. The employee filed for Social Security Disability benefits, claiming a total disability. Then he sued the school district that had employed him, claiming that the district failed to provide him with "reasonable accommodation" in the workplace, in violation of the ADA. The district asserted that by claiming a total disability for purposes of acquiring Social Security benefits, the former custodian

EMPLOYEE DISCIPLINE

Name Clearing Hearings

1. Donato v. Plainview-Old Bethpage CSD, 96 F.3d 623, 112 Ed. Law Rep. 624 (2nd Cir.1996) cert. denied, 117 U.S. 1083, 65 U.S.L.W. 3584, 3586 (2/24/97).
The court ruled that an administrator who was dismissed from a probationary appointment was entitled under the Due Process Clause of the Fourteenth Amendment to a name-clearing hearing in order to protect her liberty interest in her good name and reputation. In this case, the district presented a statement of reasons for the dismissal, at the administrator's request, which stated that she could not get along with faculty, students or parents and had an "ineffective commitment to the Middle School." The court found that this statement and placement of the statement in the teacher's personnel file prevented the administrator from being able to effectively seek other employment because the comments were "so harsh as to be likely to persuade any other school board not to hire [her]."
Although the court noted that governmental allegations of professional incompetence do not necessarily implicate a liberty interest, such allegations will support a right to a name-clearing hearing when "they...put up a significant roadblock in that employee's continued ability to practice his or her profession." The court found that the district's evaluations of the employee and its statement of reasons were not vague statements of incompetence but were "detailed lists of her supposed professional failings." The court recognized that stigmatizing statements by the government about an employee upon her discharge implicate a liberty interest only when there is public disclosure; however, it found that the disclosure requirement is satisfied when the charges are "placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers." This decision may have a significant impact on districts in connection with the dismissal of probationary teachers and administrators pursuant to the fair dismissal law, which requires that a statement of reasons be provided at the educator's request.

2. Okebiyi v. Cortines, 167 Misc.2d 1008, 641 N.Y.S.2d 791, 109 Ed. Law Rep. 334 (N.Y. Sup., 1996), appeal dismissed, 658 N.Y.S.2d 894 (2nd Dept. 5/12/97).
The court ruled that a former community school district director of operations was deprived of a constitutional liberty interest by the board's dissemination of stigmatizing allegations, thereby entitling him to a name-clearing hearing. Allegations in the report which were published in a newspaper article, included fiscal improprieties, gross mismanagement and outright theft.

3020-a Discovery

1. Arbitration Between Bd. of Ed. of Abbott UFSD v. Walthall, State Education Department File No. 3306 (3/24/97).
Hearing officer Howard C. Edelman required a teacher who was subject to a disciplinary proceeding to provide discovery materials to the district at the conclusion of the board's case, but before the teacher's case began. The hearing officer concluded that even though the education law only requires disclosure by the employing board of education, the law permits hearing officers, within their discretion, to grant disclosure of things requested by the employing board as well. "Affording the board discovery in this regard helps achieve the legislative intent of more expeditious hearings." In addition, the hearing officer also ruled that the discovery request could be made at the prehearing conference, rather than five days prior to it as stated in the law because there was no harm to the teacher's case.

2. Arthur A. Riegal, Hearing Officer, Board of Education of the City of New York, (11/24/96).
The hearing officer ruled that a teacher who is subject to a disciplinary proceeding is required to provide discovery materials (witness list and all documents that will be submitted as evidence) to the district. The hearing officer reasoned that while the law requires only the employing board to provide disclosure, it also gives the hearing officer broad power to decide discovery requests. "If the emphasis of the law is on expediting the proceedings, this goal will be more readily achieved if the district is also permitted access to documents the [teacher] plans to admit into evidence and witness lists"

Note: There are many other hearing officer decisions which have concluded that school districts are not entitled to discovery under the statute.

3020-a Statute of Limitations

1. DeMichele v. Greenburgh Central School Dist. 7, (United States District Court for the Southern District of New York 12/16/97).
In this case, the district successfully sustained charges against a teacher more than twenty years after misconduct had occurred. In most cases, §3020-a charges must be brought within three years of the alleged misconduct. However, the law makes an exception to the three year statute of limitations for misconduct that constitutes a crime. The charges against the tenured teacher in this case alleged rape, sexual abuse, endangering the welfare of a child and bribe receiving, all of which occurred during the 1972-'73 and 1974-'75 schools years. This case is now on appeal to the United States Court of Appeals for the Second Circuit and will be argued sometime before summer.

Suspension Without Pay

1. Miller v. Bd. of Educ. of the North Colonie CSD, 239 AD2d 768 (3rd Dept 1997).
A school district was wrong to suspend without pay a hall monitor who traveled abroad on three separate occasions while out of work on medical leave due to a sprained ankle, according to the Appellate Division, Third Dept. When the district learned of the employee's activities, it filed misconduct charges against him, contending that if he was able to travel, then he was able to perform his duties as a hall monitor. The charges were sustained by a hearing officer, and the district suspended the employee without pay. The court annulled the decision of the hearing officer, relying on testimony by the employee's physician that the physical requirements of the employee's job as a hall monitor could worsen his injury, whereas the walking he did during the course of his travels was good for him.

Fine for Misconduct

1. Matter of Arbitration Between The Baldwinsville Central School District v. David W. Brown Case No. 3378.
In a disciplinary proceeding based upon a bizarre set of facts, a hearing officer fined a middle school principal $11,027, sustaining section 3020-a charges by the school district that the principal had "exercised extremely poor judgment... [and] abused his position of authority and responsibility" with the district. The charges arose in connection with a dispute concerning the principal's ownership of lake front property in a nearby community. The principal talked with his attorney about filing a lawsuit against a certain woman involved in the dispute. His attorney explained that the woman would have to be served with papers in the lawsuit, but neither of them knew where the woman lived or where to find her. Having taken down the license plate number from a vehicle he had seen the woman driving is the past, the principal concocted a scheme using the plate number to find out where the woman lived. He placed a call to the local police department that was ultimately rerouted

gave up the right to claim that his disability was one that could be accommodated reasonably in the workplace. The court agreed, and ruled that the former custodian's own statements in support of his claim for Social Security Disability benefits could be used against him by his former employer (i.e. the school district) to defeat his claims under the ADA.

5. Kristoferson v. Spunkmeyer, Inc., 965 F.Supp. 545 (S.D.N.Y. 6/3/97).
In a case of first impression in New York State, the Federal District Court for the Southern District of New York ruled that a terminated employee who signs a release of liability in exchange for a severance package is not required to pay back the money immediately to his or her employer before commencing a discrimination lawsuit, so long as the employee executes a "binding undertaking" which requires the employee to pay back the employer (including possible interest) if the release is later ruled invalid. An employee's agreement to waive legal claims arising from violations of federal discrimination statutes must be made knowingly and voluntarily.

6. Varner v. National Super Markets, Inc, 94 F.3d 1209, 65 U.S.L.W. 2239 (8th Cir.1996), cert. denied, 117 S.Ct. 946, 65 U.S.L.W. 3560, 3568 (2/18/97).
The United States Court of Appeals for the Eighth Circuit ruled that an individual need not exhaust the mandatory arbitration and grievance procedures in a collective bargaining agreement before commencing a lawsuit against an employer pursuant to Title VII. Moreover, the Court also ruled that an employee's failure to comply with the reporting procedures in the employer's sexual harassment policy does not necessarily shield the employer from liability.

Race

1. Taxman v. Board of Education of Tp. of Piscataway, 91 F.3d 1547 (3rd Cir. 1996) (*en banc*), cert. granted, 117 S.Ct. 2506 (6/27/97)(Rule 46 dismissal, December 2, 1997).
The Supreme Court dismissed, on joint motion of the parties, a case it had accepted for review from the Third Circuit holding that a public school district had violated Title VII of the Civil Rights Act of 1964 when it laid off a white teacher while retaining a black teacher of equal seniority and qualifications pursuant to its affirmative action policy, which was designed to achieve racial diversity in the workplace, rather than to remedy past discrimination or redress racial imbalance. The Third Circuit had approved the district court's award of full back pay to the plaintiff, saying that this remedy most closely approximated conditions that would have existed had there been no discrimination. The parties requested the dismissal after reaching a settlement agreement.

Disability

1. Bragdon v. Abbott, 1998 WL 332958 (1998).
The United States Supreme Court ruled that the Americans with Disabilities Act (ADA) applies to individuals infected with the human immunodeficiency virus (HIV). In the case, a dentist was found to have violated the ADA when he refused to fill a cavity of a person suffering from asymptomatic HIV. The ADA defines a disability as a physical or mental impairment that substantially limits a major life activity. The court concluded that HIV substantially limits reproduction, which the court determined was a major life activity. The Court's ruling signals that many people suffering from disorders for which there are no outward symptoms may be entitled to protection under the ADA.

2. Reeves v. Johnson Controls World Services, 140 F.3d 144 (2d Cir. 1998).
A person who does not have a "disability" under the Americans with Disabilities Act (ADA) still may have a disability under New York State's Human Rights Law, according to the United States Court of Appeals for the Second Circuit. In this case, the court dismissed the plaintiff's lawsuit under the Americans with Disabilities Act (ADA), ruling that the disorder he complained of did not

"substantially limit a major life activity"such that he could be considered disabled under the ADA. However, the court allowed the plaintiff to continue the same lawsuit under New York State's Human Rights Law. According to the Court, as person will be deemed to have a disability under the Human Rights Law if the person can demonstrate a physical or mental "impairment" through "medically accepted clinical or laboratory diagnostic techniques." Moreover, the impairment need not be one that "substantially limits a major life activity" as is required to prove a case of discrimination under the ADA.

3. Simon v. Safelite Glass Corp., 128 F.3d 68 (2d Cir.,1997).
The United States Court of Appeals for the Second Circuit ruled that an employee who receives Social Security benefits was precluded, under the doctrine of "judicial estoppel," from suing his employer under the Age Discrimination in Employment Act (ADEA). In this case, an employee with severe hearing and vision problems sued his former employer, claiming that it had discriminated against him on the basis of his age, when it terminated him and refused to rehire him while simultaneously hiring younger persons for positions for which he claimed to be "fully qualified." After being terminated, but prior to suing his former employer, the employee began receiving Social Security disability benefits based on an application in which he stated, under penalty of perjury, that he "became unable to work because of his disabling condition." The former employer asked the Court to dismiss the age discrimination claim against it, arguing that the former employee's sworn statement on his Social Security application that he was "disabled" and "unable to work" should prevent him from arguing that he was qualified to hold his previous job. The Court agreed, and dismissed the employee's claim under ADEA. However, the Court noted that its decision did not specifically address the question of whether an employee would be prevented from bringing suit under the ADA under similar circumstances.

4. Hendler v. Intelecom USA, Inc., 963 F.Supp. 200 (E.D.N.Y. 4/15/97).
In a case of first impression in New York, the Federal District Court for the Eastern District of New York ruled that a claim of "hostile environment" employment discrimination is actionable under the Americans with Disabilities Act (ADA). In this case, an employee disclosed to a private employer during his job interview that he suffered from severe asthma and would require a smoke free work environment. The employee alleged that from the moment he began work, he was subjected to second hand tobacco smoke from coworkers, and that despite repeated requests for relief, his exposure to the smoke continued unabated. The employer ultimately terminated the employee, purportedly for poor performance, and the employee commenced suit under the ADA, contending that he was fired because of his complaints about the second-hand smoke.

Although public health law restrictions on smoking in public schools in New York State make it unlikely that a hostile environment claim would arise based on exposure to second-hand smoke in a school environment, the federal court's recognition of "hostile environment" discrimination claims commenced under the ADA potentially could be applied under different factual scenarios.

5. Gonzalez v. Garner Food Services, Inc., 89 F.3d 1523, 65 U.S.L.W. 2110 (11th Cir.1996), cert. denied, 117 S.Ct. 1822, 65 U.S.L.W. 3764, 3766 (5/19/97).
The court found a company that amended its health insurance benefit plan to cap AIDS-related treatment and impose a lifetime maximum limit did not discriminate unlawfully against a former employee diagnosed with AIDS who was maintaining his coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). In a lawsuit brought by the former employee's estate under the ADA for the unpaid excess claims, the court noted that changes in post-employment fringe benefits did not violate the Act because both the language and legislative history of the ADA clearly indicate Congress' intention to limit protection to current employees or job applicants who can

perform the essential functions of the job. Former employees are not protected under the ADA. according to the court.

6. Pangalos v. Prudential Insurance Co. of America, 1996 WL 612469, 65 U.S.L.W. 2384 (E.D. Pa. 10/15/96), affirmed on other grounds, 118 F.3d 1577 (3rd Cir. 6/26/97).
The court dismissed a cause of action under ADA by an employee who needed ready access to toilet facilities at all times for sudden attacks of diarrhea due to ulcerative colitis. The court determined that an essential part of the job was to visit clients at their homes and offices which required that he refrain from noticeably befouling himself on their premises. Either the employee was not disabled because his condition could be remedied by a colostomy, or he was not qualified to do the job due to the diarrhea, according to the court. The court added that the accommodation offered by the employer, a portable toilet, was reasonable.

7. Gordon v. E.L. Hamm & Associates Inc., 100 F.3d 907, 65 U.S.L.W. 2390 (11th Cir., 12/4/96), petition for cert. filed, 8/25/97).
The court reversed a jury verdict in favor of an employee who sued his employer claiming a violation of the ADA. The court determined that the employee, who suffered from cancer and was undergoing chemotherapy, failed to prove that the cancer and the chemotherapy side effects "substantially limited" his ability to work as required under the ADA. To be considered disabled, an employee must show a physical impairment that substantially limits a major life activity, which includes work, according to the court. An impairment substantially limits an employee's ability to work if it places significant restrictions on his ability to perform a class or broad range of jobs. Significant to the court's decision was the fact that the employee's doctor specifically stated that he was not disabled by the cancer and admitted that he was fully capable of working.

Sex

1. Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998 (1998).
The United States Supreme Court ruled that employees may sue their employers under Title VII for sexual harassment in cases where the alleged harasser and victim are of the same gender. In addition, the Court ruled that an alleged victim does not need to prove that the alleged harasser is a homosexual. According to the Court "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." The Court further noted that the same standard applies to same-sex sexual harassment cases as applies in opposite-sex harassment cases, that is, an employee must demonstrate that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. The inquiry is judged from the perspective of a reasonable person in the employee's position, considering "all the circumstances". For example, according to the Court a professional football player's working environment is not severely or pervasively abusive if his coach smacks him on the buttocks as he heads onto the field, however, that same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office.

2. Burlington Industries Inc. v. Ellerth, 1998 WL 336326, 66 U.S.L.W. 4634.
Faragher v. City of Boca Raton, 1998 WL 336322, 66 U.S.L.W. 4643.
The United States Supreme Court ruled that an employer may be subject to vicarious liability for an actionable hostile environment created by a supervisor even in cases where the employee who refuses the unwelcome and threatening sexual advances of a supervisor, suffers no adverse, tangible job consequences. However, the Court ruled that if no tangible employment action is taken, an employer can raise an affirmative defense to liability or damages if they are able to demonstrate the following:

a. that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and,

b. that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to prevent or correct the sexual harassment.

The Court noted that while proof that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary as a matter of law, it may assist an employer in demonstrating element (a) above. In addition, the Court further noted that an employee's failure to follow such a policy and complaint procedure will normally suffice to satisfy the employer's burden under element (b) above. No affirmative defense is available in cases where the supervisor's harassment results in an adverse employment action, such as discharge, demotion or undesirable reassignment.

3. Torres v. Pisano, 116 F.3d 625 (2nd Cir. 1997), cert. denied, 118 S.Ct. 563 (1998). In this case, the court ruled that an employer was not liable under federal law for failing to protect an employee from sexual and racial harassment because the employee insisted that her supervisor keep her complaint "confidential." The court ruled that the employer's decision to honor the employee's request for confidentiality was reasonable under the circumstances, but warned that its holding was limited to the particular facts of the case. The court cautioned that there is a point at which harassing conduct could become so severe that a reasonable employer would be required to take action, despite an employee's request to the contrary.

4. Gallagher v. Delaney, Hansen & Con Edison, 139 F.3d 338 (2nd Cir. 1998).
The court determined that it was inappropriate for a federal judge of the United States District Court for the Southern District of New York to grant an employer's motion for summary judgment in a sexual harassment case, thereby precluding the employee from having her day in court before a jury. According to the court, "[t]oday, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogenous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment..." This case may cause fewer courts to resolve sexual harassment cases through summary judgment motions.

Sexual Orientation

1. Funderburke v. Uniondale Union Free School District No. 15, 172 Misc.2d 963, (Nassau Co. Sup.Ct. 5/21/97); aff'd ___ A.D.2d ___ (2d Dept. 7/98).
A school district did not violate the state human rights law when it refused to provide health insurance benefits to the domestic partner of a school district retiree. The law "protects an individual from discrimination because of his/her status of being married [but] ..does not protect someone living in a long-term domestic partnership relationship, " according to the Nassau County Supreme Court. The district had been notified in 1995 by the NYS Dept. of Civil Service that it could elect to extend health care coverage to domestic partners of employees and retirees. The district opted not to extend the coverage under its plan, which did not provide coverage to anyone who was not a dependent of an employee or a retiree. A retiree sued the district claiming it illegally discriminated against him based on his marital status and sexual orientation.

Age

1. Oubre v. Entergy Operations, Inc., 118 S.Ct. 838 (1998)
Workers are free to sue former employers under the federal Age Discrimination in Employment Act (ADEA), even when they have signed a release of all claims against the employer, if the release

does not meet the specific requirements of the Older Workers Benefit Protection Act (OWBPA), according the United States Supreme Court. In this case, an employee who had received a poor performance evaluation was given the option of either improving her performance or accepting severance benefits and voluntarily terminating her employment. After being given 14 days to consider her options, she decided to take the severance package. In return, her employer required her to sign a release in which she agreed not to sue the employer for any reason. Despite having signed the release, the same employee later sued her former employer, claiming that the employer had discriminated against her because of her age, in violation of the ADEA. The employer conceded that the release signed by the former employee did not comply in all respects with the federal law. However, the employer claimed that the employee had ratified the defective release by accepting the severance pay, and therefore that the employee could not continue the lawsuit against it without first returning the severance pay. The federal district court and circuit court of appeals agreed and dismissed the employee's age discrimination complaint. Among other things, the OWBPA requires that an employee be given at least 21 days in which to consider a severance agreement with the employer. In this case, the employee was given just 14 days. The federal law also requires employers to give employees seven days after signing a release in which to change their mind, which was not done in this case. Furthermore, the law requires that such a release make specific reference to ADEA. The release signed by the employee in this case failed to satisfy this requirement as well. Consequently, the Supreme Court overturned the lower federal courts and restored the employee's lawsuit, holding that the defects in the release rendered it legally unenforceable. Moreover, the court specifically rejected the employer's argument that employees should be required to tender back severance pay received in exchange for signing a legally defective release as a condition of allowing them to sue their former employers. The court reasoned that such a requirement "might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult [for employees] to repay the monies..."

2. Simon v. Safelite Glass Corp., 128 F.3d 68 (2d Cir. 1997).
The court ruled that an employee who receives Social Security benefits was precluded, under the doctrine of "judicial estoppel," from suing his employer under the Age Discrimination in Employment Act (ADEA). In this case, an employee with severe hearing and vision problems sued his former employer, claiming that it had discriminated against him on the basis of his age, when it terminated him and refused to rehire him while simultaneously hiring younger persons for positions for which he claimed to be "fully qualified." After being terminated, but prior to suing his former employer, the employee began receiving Social Security disability benefits based on an application in which he stated, under penalty of perjury, that he "became unable to work because of his disabling condition." The former employer asked the court to dismiss the age discrimination claim against it, arguing that the former employee's sworn statement on his Social Security application that he was "disabled" and "unable to work" should prevent him from arguing that he was qualified to hold his previous job. The court agreed, and dismissed the employee's claim under ADEA. However, the court noted that its decision did not specifically address the question of whether an employee would be prevented from bringing suit under the ADA under similar circumstances.

3. Renz v. Grey Advertising, Inc., 135 F.3rd 217 (2nd Cir.1997).
The United States Court of Appeals for the Second Circuit ruled that employees who claim they were fired because of their age, in violation of the federal Age Discrimination in Employment Act (ADEA), only need to prove that their age was a "contributing factor" in the termination, as opposed to the "sole or primary reason." ADEA makes it unlawful to fire, refuse to hire, or otherwise discriminate against persons who are at least 40 years old.

4. Auerbach v. Board of Educ. of the Harborfields CSD, 136 F.3d.104 (2nd Cir.1998)
The court affirmed a lower court decision which had ruled that a school district did not violate the Age Discrimination in Employment Act (ADEA) when it negotiated a retirement incentive program with the teachers' union. The plan being challenged was offered to all teachers with at least 10 years of consecutive service with the district if they retired at the end of the school year in which they either turned 55 and completed 20 years of service in TRS, or reached 20 years of service with TRS and are 55 or older. The court ruled that the retirement plan did not violate federal law because eligibility to participate in the program was triggered by years of service, not age. In addition, the Court ruled that ADEA does not require an employer to provide identical early retirement incentives for employees of different ages. The court found that in order for a retirement incentive plan to be lawful it must meet the following criteria: the incentive must be voluntary, it must available for a reasonable period of time and it may not arbitrarily discriminate on the basis of age.

5. Maher v. Long Island Univ., unpublished case (2nd Cir. 1997) *cert. denied.*
The trial court held that a former employee failed to file claims of age discrimination and retaliation with the Equal Employment Opportunity Commission within the statutorily-required 300 days after receiving notification of termination.

EMPLOYMENT CONTRACTS

1. Rampello v. East Irondequoit Central School District, 653 N.Y.S.2d 469 (4th Dept. 1/7/97).
The court ruled that a cash payment to a principal for accumulated unused sick time in consideration for his retirement violated the State Constitution's prohibition against gifts of public funds because the payment was not authorized in advance of the accumulation. The court directed the principal to repay the $75,000 he received for the unused accumulated sick days, but noted that the school board could renegotiate the retirement incentive "on some other basis" consistent with the law.

2. People v. Murphy, 652 N.Y.S.2d 754, 115 Ed. Law Rep. 447 (2nd Dep't 1/27/97).
The Appellate Division, Second Dept. upheld a retirement payout of nearly $1 million to the former Suffolk County BOCES Superintendent under the terms of a contract that permitted the Superintendent to accrue and later "cash in" excessive amounts of sick and vacation leave. Subsequent amendments to the education law now place limitations on compensation of BOCES superintendents.

TENURE AND SENIORITY RIGHTS

1. Avila v. Board of Educ. of North Babylon Union Free School District, 658 N.Y.S.2d 703, 119 Ed. Law Rep. 205 (2nd Dep't 6/23/97).
The court ruled that a teacher who was in part-time position after being excessed from a full time position, was entitled to a new seven-year period on the preferred eligibility list (PEL) from the date the school district abolished her part-time position. In this case, a tenured teacher was excessed from a full time position at the end of the 1986-87 school year and was placed on the PEL. In 1987 she was reinstated again, only to be excessed again at the end of the 1987-88 school year. Several years later she was appointed to a part-time position, which was abolished in 1995. In 1995, the district appointed another teacher from the PEL to a position under the belief that Avila's seven year term on the PEL had expired. Avila sued, claiming that she had a right to the position. The issue before the court was whether PEL's seven year period should be measured from June 1988, the date Avila was laid off from her last full time position, or June 1995, the date her part-time position was abolished. The court ruled that Avila was entitled to a new seven year period on the PEL from June 1995, the date her part-time position was abolished. The New York State Court of Appeals has refused to hear this case.

2. Yastion v. Mills, 229 A.D.2d 775, 645 N.Y.S.2d 585, 111 Ed. Law Rep. 940 (3rd Dept. 7/18/96).
The court ruled that a school counselor knowingly and freely waived his tenure rights when he signed an agreement with the district which contained express provisions stating that tenure did not apply to the position. The counselor was terminated from his position after having served three and one-half years. Since there was no evidence that the employee had been coerced or subject to duress in signing the agreement, the waiver of tenure agreement was upheld.

3. Appeal of Craft & Dworkin (Yonkers City School District), 36 Educ. Dep't Rep. 314 (2/19/97).
A school board member may not abstain from voting on whether to grant tenure to an employee based upon a philosophical objection to the state's tenure system, according to the commissioner of education. School board members are "public officers," and as such, take an oath to obey federal and state laws, including the state's tenure laws, reasoned the commissioner, who made it clear that a board member who abstains from a tenure vote based upon philosophical objections to the tenure system faces possible removal from office for dereliction of duty. The commissioner rejected the claim that board members have a First Amendment right to express their philosophical objections to tenure. In addition, the commissioner ruled that the board members were not entitled to a certificate of good faith pursuant to §3811(1) which would have enabled them to be defended and indemnified by the school district.

4. Feldman v. Community School Dist. 32, 231 A.D.2d 632, 647 N.Y.S.2d 805, 113 Ed. Law Rep. 385 (2nd Dept. 1996), leave to appeal denied, 89 N.Y.2d 811, 657 N.Y.S.2d 403 (3/20/97).
The Appellate Division, Second Department, ruled that an assistant principal's year-long stint in the central office performing administrative tasks pending a hearing on criminal charges did not count toward his three-year probationary term. The assistant principal, who was eventually acquitted, could not claim tenure by estoppel when the district discharged him after four years in the district, because he had not been performing the duties of an assistant principal while he was in the central office.

5. Hudson v. Bd. of Ed. of Hempstead School Dist, 64 Misc.2d 60 (Supreme Ct., Nassau County, 1997).
The court ruled that a teacher who worked as a "permanent" substitute teacher for two years prior to receiving a probationary appointment was entitled to two years of credit towards tenure. The court treated the "permanent" substitute as if she were a "regular" substitute teacher under the education law. Under state law, the probationary period may be reduced by as much as two years, based upon credit (known as "Jarema" credit) for service as a "regular" substitute teacher.

6. Kaufman v. Fallsburg Central School District Bd. of Educ., 91 N.Y.2d 57 (12/17/97).
The court affirmed a decision of the Appellate Division, Third Department which had held that a school district properly granted a teacher retroactive seniority credit in the elementary tenure area for a year of service during which the teacher instructed mainstreamed special needs students in the sixth grade. The Court held that the determination was proper even though the teacher's original probationary appointment in special education was not changed to elementary education until after the year in question. The court found the district's grant of retroactive credit proper, because the teacher had devoted a substantial portion of her time during the year in question to the "common branch subjects," indicating service in the elementary tenure area under the commissioner's regulations. Another teacher who was excessed argued that she had greater seniority rights and that the district had no authority to grant retroactive credit in another tenure area. The Appellate Division had distinguished this case from its earlier decision in Matter of Boron v. Sobol, 205 A.D.2d 28 (3rd Dept.1994), in which it found improper a district's retroactive change of tenure area from elementary to remedial reading. In Boron, unlike this case, the court found no evidence that the teacher actually had taught remedial reading, and no evidence that the teacher's assignment actually had changed

from the original elementary designation, whereas in this case, the teacher's assignment did change from special education to elementary education, and the teacher accepted the assignment. The Court of Appeals found that the school district's failure to obtain retained teacher's written consent to her assignment to the elementary tenure area did not preclude a retroactive award of seniority credit to the teacher in such tenure area.

7. Abrantes v. Board of Educ. of the Norwood-Norfolk Central School District, 649 N.Y.S.2d 957, 114 Ed. Law Rep. 608 (3rd Dept.1996), leave to appeal denied, 89 N.Y.2d 812, 657 N.Y.S.2d 405 (3/27/97).
The court ruled that a school board which appointed a teacher to a nonexistent tenure area could not abolish the position and terminate the teacher without first reclassifying the teacher's tenure area. The court noted that this case represents an exception to the general rule that a tenure area may not be altered retroactively. In this case, the teacher was appointed to a 3 year probationary term as a computer teacher. Although she taught grades 7-12, she received tenure as a computer teacher for grades 8-12. She then taught both high school and elementary school for the next few years. When the district abolished her position, the teacher claimed she had actually been serving in the elementary tenure area. The court found that the district had failed to comply with the commissioners regulations when it appointed her to a nonexistent tenure area. The court remanded the case to the board of education to determine the teacher's proper tenure area based upon the work performed.

8. Appeal of Elmendorf (Windham-Ashland-Jewett CSD), 36 Educ. Dep't. Rep. 308 (2/19/97).
A tenured building principal whose position was abolished (pursuant to a variance) was not entitled to a newly created position as assistant superintendent, because the two positions were not sufficiently similar, according to the commissioner of education. Under the education law, a "teacher" whose position is abolished may be entitled to another position in the district if the teacher can show that the position being sought is in the same tenure area and includes duties at least 50% of which are similar to those of the abolished position. The certification required for the two positions is also a significant factor. In this case, the principal whose position was abolished argued that she was entitled to the newly created position of assistant superintendent, because it was in the same tenure area, the duties were similar, and she was certified for the position. Refusing to apply the 50% rule applicable in the context of "teacher" tenure to a case dealing with administrative tenure, the commissioner simply compared the two administrative positions, and concluded that even though the tenure area was the same and that the principal held the required certification, the new position required a higher degree of training and additional skills in district wide management and fiscal matters, such that the district was not obligated to make the appointment.

9. Costello v. Bd. of Ed. of East Islip UFSD, __ A.D.2d __ (2d Dept. 5/98).
Lambert v. Middle Country CSD, (Nassau County Supreme Ct., (10/7/97)
In these cases, teachers from both districts challenged school board resolutions (as well as the validity of contracts entered into pursuant to the resolutions), which provided that all new teachers in each district would be employed pursuant to individual contracts providing for specified terms of employment in non-tenure bearing positions. The contracts entered into pursuant to the resolution contained a waiver of tenure rights signed by the teachers who were granted employment under these contracts. In defense of this practice, the districts relied on a prior case decided by the state's highest court, Feinerman v. BOCES of Nassau County (48 N.Y.2d 491 (1979) for the proposition that the contracts waiving tenure are valid and enforceable, so long as the waiver is made "knowingly" and "voluntarily."

The Lambert court ruled that a board of education does not have the authority to pass a resolution requiring all new teachers to sign a contract waiving their tenure rights as a condition for being hired by the district, and ordered the district to give the affected teachers probationary appointments. The court rejected the district's argument that nothing in State Education Law prevents teachers from

making a voluntary and knowing waiver of their tenure rights, observing instead that state tenure laws demonstrate a desire on behalf of the Legislature to foster academic freedom and that teachers cannot be hired under individual contracts of employment in order to circumvent the judgment of the Legislature. The court distinguished the Feinerman decision, relied upon by the district, as a narrow exception applicable only to "temporary position[s] dependent on annual federal funding." he Association has been advised that no appeal will be taken in the Lambert case.

Recently, the Appellate Division, Second Department ruled in Costello that school districts cannot require prospective teachers to waive their right to a tenure track probationary appointment as a condition of being hired, affirming the ruling of the Nassau County Supreme Court. The court concluded that the particular system of renewable employment contracts utilized by the district in lieu of granting probationary appointments was improper because it effectively replaced the system of tenure established by the State Legislature. However, the Court did not rule that a teacher could never waive his or her right to tenure. According to the court: "A teacher's rights with respect to tenure are waivable when the waiver is freely, knowingly and openly arrived at without the taint of coercion or duress."

10. Speichler v. BOCES, Second Supervisory District, 90 N.Y.2d 110, 119 Ed. Law Rep. 614, 659 N.Y.S.2d 199 (5/6/97).
Per diem substitutes can qualify for "Jarema Credit," according to New York State's highest court. Jarema Credit allows for a reduction of up to two years in the probationary period a teacher must serve before becoming eligible for tenure when the teacher has worked as a substitute for a semester or more prior to receiving a probationary appointment. In this case, a BOCES teacher was initially hired as a per diem substitute for an indefinite period and ultimately worked for 11 months in that position. Unlike regular BOCES substitutes, who received special appointments for a fixed period of time with a prorated salary and full benefits, the per diem substitute was paid a daily rate and was given limited benefits. When the former per diem substitute was denied tenure at the end of her probationary period, she sued BOCES, claiming she already had acquired tenure by estoppel, based on Jarema Credit she maintained she earned for her work as a per diem sub. BOCES argued that under the education law only regular substitute teachers are entitled to Jarema Credit. The court ruled that substitute teachers who teach continuously for at least one full semester before being appointed to a probationary term are entitled to credit for their substitute service, regardless of whether they serve as a per diem or regular substitute. "The ambiguous term 'regular substitute' should be defined by the actual nature and continuity of the substitute service, not by the anticipated duration of the replaced teacher's absence," observed the court.

TAYLOR LAW ISSUES

Direct Dealing

1. Odessa-Montour Teachers Association v. Odessa-Montour Central School District, 31 PERB ¶4529 (1998).
Administrative Law Judge Susan Comenzo addressed various issues, including the question of whether a school superintendent violated the prohibition on direct dealing with his employees, by sending a letter inviting their comments on requirements of the Board of Regents which would necessitate expanding the length of the school day. The Administrative Law Judge ruled that the contact with unit members was permissible and not a violation of the Act. The Administrative Law Judge ruled that this communication did not convey the impression that its purpose was to meet express needs of the responding employees or that it improperly intended to do so.

Mandatory/Non-Mandatory Subjects of Bargaining

1. Matter of the Town of Carmel v. Public Employment Relations Board, 667 N.Y.S.2d 789 (3d Dept., January 15, 1998).
The Town alleged in this case that a safety stipend paid to officers on light duty, was payment in excess of the payments required under General Municipal Law §207-c. The Town, therefore, argued that it was not a mandatorily negotiable subject, requiring negotiation prior to discontinuance of the benefits to certain light duty employees. The Court ruled that the stipend did constitute a term and condition of employment, and sustained the Improper Labor Practice Charge against the employer for altering a term and condition of employment without prior negotiation in violation of Civil Service Law §209-a(1)(d).

2. Matter of Aeneas McDonald Police Benevolent Association v. City of Geneva, 667 N.Y.S.2d 166 (4th Dept. 1997).
The Court ruled that the City was not required to negotiate with the Union representing current and retired police department members regarding the City's unilateral change of retirees health insurance benefits. The retirees were not currently, nor had they ever been, beneficiaries of the negotiated labor agreement that provided such benefits during retirement and the Court ruled that the City resolution providing for payment of such benefits to retirees did not confer vested rights upon the retirees.

3. Matter of West Genesee Teachers Association, NYSUT v. West Genesee Central School District, Case No. U-17283, (PERB, July 1, 1998).
This case involved a charge filed by the West Genesee Teachers Association alleging that the School District violated Section 209-a(1)(a) and (c) of the Act. The Association alleged that the District threatened certain teachers who had been "appointed" by the WGTA to a building level Shared Decision Making Committee, with insubordination if they attended a training session sponsored by the District for members of the Shared Decision Making Committee. Through the Shared Decision Making plan, the Union "selected" the teachers to participate in the Shared Decision Making Committee. The Teachers Association only selected teachers who were active Union members and supporters. The District rejected those selections and stated that those persons were not to be seated on the Shared Decision Making Committee. The District reserved for itself the right to have final say over who was an active members of the Shared Decision Making Committee.

The District's objection to the Teachers Association proposed appointees, was that the Teachers Association appointees owed an allegiance to the Teachers Association, rather than to teachers generally. The Union argued that it was entitled to select persons whom it believed appropriate to represent the Association.

The Administrative Law Judge found in favor of the Teachers Association and sustained the charge. PERB reversed, dismissing the charge. Specifically, PERB ruled that the District maintained, in good faith, that it had final say over who was selected for membership on the Committee and that the district's actions were taken in good faith when it threatened to discipline those teachers for insubordination if they attended a training session.

4. Civil Service Employees Association, Local 1000 v. County of Schuyler, 31 PERB ¶4507 (1998).
Administrative Law Judge Sandra Nathan ruled that a county was permitted to transfer exclusive unit work of a clerk/typist to non-bargaining unit employees. The Administrative Law Judge found that language in the collective bargaining agreement, specifically the management clause, permitted the transfer. The Administrative Law Judge dismissed the charge, in all respects.

5. Council 82, AFSME-AFL/CIO v. State of New York Department of Corrections, 31 PERB ¶4518 (1998).
Administrative Law Judge J. Albert Barsamian ruled that the Department of Corrections violated its bargaining obligation by unilaterally establishing a requirement that employees provide prior documentation for sick leave requests to attend scheduled medical appointments, regardless of the length of the visit. The Administrative Law Judge ruled that the employer's stated need to control sick leave abuse did not privilege this unilateral change in a mandatory subject of bargaining and represented a significant departure from ten-year practice of only requiring such documentation after medical visits and then only if the visit was in excess of four hours.

6. Council 82, AFSCME-AFL/CIO v. State of New York Office of Mental Health, 31 PERB ¶4520 (1998).
Administrative Law Judge Gordon R. Mayo ruled that a psychiatric facility violated Civil Service Law §209-a(1)(d) of the Taylor Law (its bargaining obligation) by issuing a no smoking policy which contained a five-step disciplinary component. The policy, which exposed employees to disciplinary measures, where none had previously existed, was found by the Administrative Law Judge to be a mandatorily negotiable subject of bargaining.

7. Patchogue-Medford Congress of Teachers (PMCT) v. Patchogue-Medford UFSD, 30 PERB ¶3041 (9/9/97).
A school district may not unilaterally adopt and implement a policy prohibiting sexual harassment by members of the teachers' union, where such a policy contains investigatory and disciplinary procedures, according to the full PERB Board. The district argued that its sexual harassment policy did not contain either investigatory or disciplinary procedures that are mandatorily negotiable under the Taylor Law. NYSSBA submitted a friend of the court brief on the district's behalf arguing that Title IX, a federal law, requires the district to have such a sexual harassment policy in place, and therefore that any contrary state law or decision is preempted by the federal law. In rejecting the preemption argument, PERB determined that nothing in the federal law or regulations "manifest an intention by the federal government to exempt school districts from the collection bargaining obligations" of the Taylor Law. However, PERB noted that a preemption defense in the context of an applied setting, such as after negotiations had been undertaken and ended in impasse, was not before it and expressed no opinion on that issue. Furthermore, districts which already have a similar policy or past practice in place for the requisite period of time without being challenged by the union may be insulated from the impact of this decision. The school district has commenced action against PERB in federal district court.

8. Riverhead Faculty Assoc. v. Riverhead CSD PERB ALJ U-18568
A school district may unilaterally impose a requirement that teachers submit documentation to the superintendent evidencing those occasions when they provided after-school help to students and when they had contact with parents, according to a PERB ALJ. The district imposed this requirement upon teachers because of complaints from parents that they were not being notified when their children were experiencing problems in school. The district intended that the requirement would not only make teachers more conscientious about meeting with parents and students, but that it also would enable teachers to defend themselves against parental criticism. The ALJ noted there was no evidence the district intended to use the records in connection with teacher evaluations. Moreover, the district was not requiring teachers to expand their contacts with parents or students, but rather only requiring them to document those contacts in some minimal way. Accordingly, the ALJ found such a requirement was a nonmandatory subject of bargaining, indistinguishable for instance, from the requirement that teachers keep lesson plans.

9. Middle Country Secretarial Ass'n v. Middle Country CSD, 30 PERB ¶4556 (4/2/97).
A school district may require its staff to wear photo identification cards without first negotiating the issue with the union, where the identification system relates to the employer's mission to promote safety and accountability, according to a PERB administrative law judge.

10. CSEA v. State of New York (Dept. of Taxation & Finance), 30 PERB ¶3028 (4/30/97).
In this case, the employer admonished certain employees to quit wearing blue jeans to work. There was evidence that employees in the same office had worn blue jeans many times over the years without incident. The employer did not have an employee dress code per se, but did distribute an employee handbook that directed employees to dress appropriately for the work to which they were assigned. A PERB ALJ ruled that the employer could prohibit employees from wearing blue jeans to the extent that jeans were not appropriate attire for the work to which they were assigned. Observing that the employees had been permitted to wear blue jeans for many years without restriction, PERB reversed the decision of the ALJ, holding that the employees "had a reasonable basis to believe that blue denim jeans were included in the definition of appropriate office attire," and that the employer's restriction against wearing jeans amounted to a change in the terms and conditions of employment that should have been negotiated with the union.

11. Transport Workers Union, Local 100 v. NYC Transit Authority & MABSTOA, 30 PERB ¶3030 (5/28/97).
PERB affirmed the ALJ's ruling that the transit authority violated its duty to bargain when it unilaterally imposed standards, greater than those imposed under the state's Vehicle and Traffic Law, for the temporary or permanent removal of bus drivers involved in traffic accidents or convicted of drug and alcohol offenses and/or moving violations.

Good Faith Bargaining

1. Matter of Civil Service Employees Association v. Public Employment Relations Board, et al., 669 N.Y.S.2d 761 (3d Dept., March 12, 1998).
The Civil Service Employees Association filed an Improper Practice Charge against the County of Monroe, alleging that its unilateral effort to upgrade the titles of Physical and Occupational Therapists employed by the County Department of Health, violated Civil Service Law §209-a(1)(a) and (d). The Union alleged that the County had engaged in bad faith negotiations and that its tactics eroded the bargaining unit. The Appellate Division, Third Department rejected the contention. The Court ruled that PERB's finding that the County was not obligated to negotiate the salary upgrades was valid. The Court ruled that local governments should not be compelled to negotiate allocation of jobs to salary grades. Those matters are "an essential aspect of the level and quality of service to be provided by a public employer."

2. Carmel CSD v. Carmel Teachers Ass'n., Case No. U-19001, __ PERB ¶__ (6/26/98).
In this case, the President of the Teachers Association sent a letter to the Smith Barney investment group, claiming that the School Board President, who was an employee of Smith Barney, was dishonest in his dealings as School Board President. The letter suggested that unless Smith Barney took action against this employee, the President of the Teachers Association would use his influence with several hundred thousand union members to discourage them from investing with Smith Barney. The school district filed an improper practice charge with PERB, alleging that the letter was sent to the private employer of the School Board President in an attempt to influence negotiations between the district and the teachers association for a successor collective bargaining agreement. A PERB ALJ ruled that the letter was protected by the right of free speech and that it did not constitute a violation of the duty to bargain.

3. NYS Police Investigators Ass'n. v. State of New York (Div. Of State Police), 30 PERB ¶3037 (08/05/97).
PERB ruled that certain wage information requested from a public employer by a union was not reasonable under the circumstances, and therefore concluded that the Taylor law did not require the employer to provide the information. The State of New York, which was the employer in this case, conducted a survey of more than 100 local police agencies to obtain salary and benefit information in preparation for negotiations with a union representing State Police investigators. Although the State negotiators did not use the survey to justify its proposals or as a defense to the union's proposals, the union requested the wage information obtained from the survey. When the State refused the request, the union filed an improper practice charge.

Under the Taylor Law, public employers have an obligation to comply with "reasonable" requests by union representatives for information needed by the union to prepare for contract negotiations. The reasonableness of the request mainly depends upon: (1) the burden on the employer in providing the information; (2) the availability of the information elsewhere; (3) the necessity of the information to the union; and (4) the relevancy of the information. In this case, PERB determined that the request from the union was unreasonable, primarily because the union could have conducted its own survey to obtain the same information.

Procedure

1. Matter of Rhinecliff Teachers Association v. Rhinecliff Union Free School District, 31 PERB ¶4528 (1998).
Administrative Law Judge Susan A. Comenzo addressed certain statute of limitations issues. In the decision, Judge Comenzo also addressed the question of the applicability of the Notice of Claim requirement. The Administrative Law Judge ruled that no Notice of Claim was required in a case filed pursuant to Civil Service Law §209-a(1)(a) and (b). In coming to this conclusion, Judge Comenzo relied upon an earlier PERB decision in United School Workers of Mahopac v. Mahopac Central School District, 28 PERB ¶3045 (1995). In that case, the Board ruled that a Notice of Claim was not required as a condition precedent to the prosecution of an Improper Labor Practice Charge alleging unlawful interference and discrimination in retaliation for participation in protected activities. The Board found that the statutorily proscribed conduct was a vindication of a public, rather than a private, interest, notwithstanding that the remedy may accrue to a given individual period. The Mahopac decision was not appealed to the Courts.

2. Board of Education of the Union-Endicott Central School District v. PERB, 197 A.D.2d 276 (3d Dept. 1994).
The Appellate Division ruled that a Notice of Claim was required because where "private relief" is sought, Section 3813 of the Education Law applies.

3. Matter of Patchogue-Medford Congress of Teachers, v. Patchogue-Medford Union Free School District, Case No. U-15443, 30 PERB ¶3041, (1997).
The Public Employment Relations Board addressed the issue of the Notice of Claim defense under Education Law §3813. PERB ruled here that action by the Board of Education to adopt the sexual harassment policy did not give rise to the refusal to bargain charge. Incredibly, they concluded that even though the Board acted publicly to adopt a policy, it was not until executive action to implement that policy, that the requirement to file a Notice of Claim was triggered. This appears directly contrary to a long-standing line of cases that established the accrual dates for Notice of Claim filings in other settings. In those cases, the accrual date is determined as the date when damages first became ascertainable. Clearly, if that standard is followed, the damages become ascertainable when

the Board of Education acts to adopt the policy. PERB found the filing of the Charge satisfied the requirements of Education Law §3813.

4. Bd. of Educ. for the City School Dist. of the City of Buffalo v. Buffalo Teachers Federation, Inc., 89 N.Y.2d 370, 653 N.Y.S.2d 250, 115 Ed. Law Rep. 1014, motion for reargument denied 89 N.Y.2d 983 (2/18/97).
The court ordered the district to fund the monetary provisions of a collective bargaining agreement, despite the fact that the board refused to vote to fund the agreement. In this case, the negotiating teams for both the district and the union reached a tentative agreement. The union ratified the agreement, but the school board refused to approve the agreement. The union then filed an improper practice charge claiming that the district failed to bargain in good faith. PERB sustained the charge and ordered the superintendent to sign the agreement. The board adopted a resolution enabling the Superintendent to sign the agreement, but passed an additional resolution indicating that the board did not legislatively approve the agreement and would not fund the agreement. The district then brought an action seeking a declaration that they were not required to fund the agreement. The district relied on §201.12 of the Civil Service Law which states that "any provisions...which require approval by a legislative body...shall become binding when the appropriate legislative body gives its approval." The court ruled that once the Board directed the Superintendent to sign the agreement, no further action on its part was necessary to implement the terms of the contract.

Subcontracting of Work

1. Civil Service Employees Association, Local 1000 v. Lackawanna City School District, 31 PERB ¶4561 (1998).
Administrative Law Judge Adam D. Kaufman ruled that the School District did not violate its bargaining obligation by subcontracting construction, electrical and carpet cleaning duties to non-unit personnel where evidence indicated that at-issue work had been previously performed by unit and non-unit workers. The Administrative Law Judge found on the record that the Union had failed to prove exclusivity over the transferred work. The Administrative Law Judge found, however, that there was sufficient evidence to support an allegation that the District's use of non-unit personnel to move furniture and clean vinyl flooring was improper. The Administrative Law Judge ruled that the District's claim of "emergency" was not substantiated. The District had an arbitration ruling that required it to bring its facilities into compliance with accessability requirement of Section 504 of the Rehabilitation Act and the American With Disabilities Act. The Administrative Law Judge found that the arbitrator's order could not be read as requiring full compliance immediately. The Administrative Law Judge further rejected the claim that the District lacked the equipment necessary to effect the moving of classroom and office furniture and contents from classroom to classroom and/or building to building or that such tasks were sufficiently distinct from unit work and could not be performed by unit members within the alleged time constraints.

2. Matter of Suffolk County Corrections Officers v. New York State Public Employment Relations Board, 668 N.Y.S.2d 400 (2d Dept., January 26, 1998).
The Union filed an Improper Labor Practice Charge alleging that 18 corrections officers had been reassigned to provide supervision at a new facility. Further, deputy sheriffs were assigned to provide for the care and custody of the detainees at the Cohalan Complex. The Union filed an Improper Labor Practice Charge alleging that the County had failed to negotiate prior to making the change. PERB dismissed the Charge upon a finding that the Union had failed to establish that the corrections officers had previously performed the work at issue exclusively. The Appellate Division, Second Department affirmed the dismissal of the Charge. The Court cited, with approval, Matter of Niagara Frontier Transportation Authority, 18 PERB ¶3083.

3. Civil Service Employees Association v. Warrensburg Central District, 30 PERB ¶3056 (1997).
The Union alleged that the School District violated its bargaining obligation by assigning non-unit school administrators to perform chaperon duties at various school functions. The Charge was dismissed by PERB where the claim work was routinely performed by both unit teachers and non-unit administrators, thereby defeating the Union's claimed exclusivity argument.

4. Vestal Employees Assoc. v. Vestal CSD, 30 PERB ¶3029 (5/28/97).
A school district did not violate the Taylor law when it unilaterally transferred to BOCES printing duties which previously had been performed exclusively by a district employee, according to the full PERB board. PERB concluded that the Education Law demonstrates a clear legislative intent that the district's transfer of printing services to BOCES is a nonmandatory subject of negotiation. In this case, the Commissioner of Education approved the contract entered into between the district and the BOCES for the transfer of printing duties, which PERB considered powerful evidence that the district had the authority to subcontract these duties. Finally, PERB concluded that a prior New York State Court of Appeals decision holding the transfer of "instructional" duties from a school district to a BOCES exempt from mandatory bargaining provisions of the Taylor was applicable and binding to the transfer of "noninstructional" duties in this case. (See Webster Central School District v. PERB, 75 N.Y.2d 619 (1990)).

Triborough Issues

1. Matter of the City of Utica v. Zumpano, as President of the Utica Professional Firefighters Association, et al., 91 N.Y.2d 964 (April 30, 1998).
This case challenged the constitutionality of Civil Service Law §209-a(1)(e) which provides that upon the expiration of a collective bargaining agreement, a public employer shall continue all the terms of the expired agreement until a new agreement is negotiated. The City of Utica alleged that this provision violated the home rule provision of the State Constitution. The Court ruled that Section 209-a(1)(e) of the Civil Service Law was not a "special law" and, therefore, a strict scrutiny standard would not be applied in analyzing its applicability. The Court found that Section 209-a(1)(e) (the Tri-Borough Amendment), was a law of general application and thereby valid even under the home rule provision of the State Constitution.

   The Court of Appeals thereby ruled that a minimum staffing and equipment provision in an expired collective bargaining agreement with the Firefighters Union was, therefore, valid and enforceable.

2. Matter of Greece Support Services Employee Association v. Public Employment Relations Board, 1998 WL 248878 (A.D.3d, May 14, 1998).
The parties entered into a memorandum of understanding containing a hypothetical salary schedule for the 1993-94 and 1994-95 school years, based on an estimated 3.6 percent cost of living adjustment. When necessary index data became available, the schedules were recalculated using the actual cost of living percentage. After the contract expired on June 30, 1995, Greece Support Services Employee Association filed an Improper Labor Practice Charge alleging that the School District failed to recalculate salary schedules to include cost of living increases for the 1995-96 school year and that this constituted a violation of Civil Service Law §209-a(1)(e). The Administrative Law Judge ruled in favor of the Union. The full PERB board reversed the Administrative Law Judge's decision and dismissed the Improper Labor Practice Charge. Petitioner Union commenced this Article 78 proceeding seeking to annul PERB's determination as arbitrary and capricious. The Supreme Court dismissed the Petition. The Appellate Division, Third Department has now affirmed the ruling of the State Supreme Court and dismissed the Charge. The Court found that under the circumstances of this case, Civil Service Law §209-a(1)(e) did not

mandate further adjustments be made in the schedules for salaries after the contract expires. The Court found intent to limit the duration of the contract term from the whole agreement.

3. Police Benevolent Ass'n of NYS Troopers, Inc. v. State of NY (Div. Of State Police), 30 PERB ¶4515 (1/22/97).
A disputed provision of an expired contract continues unless the provision itself or the bargaining history of the parties clearly indicates that the parties intended the provision to sunset, according to a PERB administrative law judge. The provision in question indicated that the state was required to pay state troopers a "clothing allowance of $100 on or about Dec.1 of each year of this agreement." After the contract expired, the state stopped the payments. The troopers' union charged the state with a violation of the Triborough Amendment for refusing to continue all the terms of the expired agreement. The ALJ sustained the improper practice charge, refusing to construe the phrase "each year of the contract" as a sunset clause, because the phrase itself was ambiguous, and because the bargaining history of the parties did not support an intent to sunset the provision.

4. Greece Support Services Employees Assoc. v. PERB, 30 PERB ¶7002 (Sup.Ct., Albany Co. 2/18/97).
According to the court, PERB properly concluded that the school district was not obligated, upon contract expiration, to create new salary schedules based on the cost of living adjustment (COLA) formula set forth in expired collective bargaining agreement. Adjustment in salary schedule based on the COLA provision was held applicable only to three year period covered by the agreement. The Court sustained PERB's finding that the "expressed intent of the parties was that the cost of living calculation would be finite in application."

5. Matter of City of Utica (Zumpano), 661 N.Y.S.2d 348 (4th Dept. 7/3/97).
The court ruled that a municipality facing financial crisis was required to maintain the minimum staffing and equipment as set forth in the expired collective bargaining agreement. PERB and the lower court had ruled that forcing the municipality to continue the minimum staffing and equipment clause in the expired agreement was void against public policy.

Arbitration

1. Matter of Watertown City School District, 668 N.Y.S.2d 515 (4th Dept. 1998). The Appellate Division, Fourth Department affirmed four stays of arbitration granted to school districts who participated in the Jefferson-Lewis BOCES health plan. Each school district appointed only one voting representative to the Board of the plan, which was a separate entity. Each case involved changes made to the plan benefits by the Board of Trustees of the plan. The school districts continued to provide health benefits to their employees through the plan. The grievances were not arbitrable because the disputes were with the plan, not with the school districts.

Jurisdiction

1. Matter of Roma, et al. v. Ruffo, as President of the Board of Education of the Susquehanna Valley Central School District, 667 N.Y. Supp.2d 500 (3d Dept. 1998).
Petitioners were employed as full-time matrons by the Susquehanna Valley Central School District. The collective bargaining agreement between the District and the Civil Service Employees Association provided that the matrons "shall normally work an eight-hour day/40-hour week." The contract also contained a strong management rights clause. The contract also committed the District to negotiate collectively with CSEA as to "salaries and terms and conditions of employment." The contract further provided that no change in District policy concerning employees' working conditions

may be implemented without prior negotiation with the CSEA. The contract also contained a four-step grievance process which culminated in a Board-level hearing.

The Board elected to reduce the hours of the matrons from full-time to part-time. The matrons filed a grievance claiming that the contract was violated in that the District failed to negotiate with the Union before voting to reduce the position from full- to part-time. After unsuccessfully challenging the action of the Board of Education through the grievance process, the employees filed an Article 78 proceeding. The State Supreme Court initially ruled that the Board had violated the terms of the collective bargaining agreement and ordered the matrons reinstated until such time the Board completed its obligations to negotiate with the Union. The Appellate Division, Third Department however, reversed and dismissed the Petition. The Appellate Division ruled that this Petition fell within the area of the exclusive jurisdiction of the Public Employment Relations Board. That the issue of whether a term and condition of employment must first be negotiated is an area of exclusive jurisdiction of the Public Employment Relations Board. The Appellate Division ruled that the Supreme Court was without jurisdiction of the matter and dismissed the Petition with leave to refile with the Public Employment Relations Board. There was a two-judge dissent. The case is now on appeal in the Court of Appeals and is scheduled for argument in October of 1998.

2. Matter of West Genesee Teachers Association, NYSUT v. West Genesee Central School District, Case No. U-17283, (PERB, July 1, 1998).
This case involved a Charge filed by the West Genesee Teachers Association alleging that the School District violated Section 209-a(1)(a) and (c) of the Act. The Association alleged that the District threatened certain teachers who had been "appointed" by the WGTA to a building level Shared Decision Making Committee, with insubordination if they attended a training session sponsored by the District for members of the Shared Decision Making Committee. Through the Shared Decision Making plan, the Union "selected" the teachers to participate in the Shared Decision Making Committee. The Teachers Association only selected teachers who were active Union members and supporters. The District rejected those selections and stated that those persons were not to be seated on the Shared Decision Making g Committee. The District reserved for itself the right to have final say over who was an active members of the Shared Decision Making Committee.

The Administrative Law Judge found in favor of the Teachers Association and sustained the Charge. PERB reversed, dismissing the charge. Moreover, PERB indicated that it was assuming jurisdiction only of the allegation of an Unfair Labor Practice, not the interpretation of the regulations on shared decision making, which it ruled were in the exclusive jurisdiction of the Commissioner of Education. In addition, PERB made the following observation:

> The possible absence of an adjudicatory forum is not, however, a reason to create one under the Act's improper practice provisions, a mechanism ill suited, at best, to resolve such disputes. We are also concerned about the implications of a contrary decision. Subjecting disagreements about the meaning of an SDM plan to improper practice jurisdiction could involve us regularly and deeply in reviewing the shared decision making process, which we do not believe was ever intended to be adversarial to any degree or open to regular review outside of the educational context.

3. Matter of Newburgh Firefighters Assoc. v. City of Newburgh, 30 PERB ¶3027 (4/30/97).
The PERB board held that total access to PERB jurisdiction is not waived by a contract provision requiring certain claims to be subject only to court review, finding that any waiver of right to file a charge must be clear and explicit.

Civil Service Law

1. Matter of Professional, Clerical, Technical Employees Ass'n (Buffalo Board of Education), 90 N.Y.2d 364, 660 N.Y.S.2d 827 (5/8/97).
A school district may be required to give persons listed on a civil service eligibility list preference in job promotions, if this is agreed to either through collective negotiations or pursuant to past practice, according to the New York State Court of Appeals. The case arose from two conflicting decisions involving the same school district. In the first case, the appellate court ruled that a public employer may not surrender its "ultimate appointing authority" through collective bargaining, and that an arbitrator's award which enforced an agreement to appoint the top-ranked candidate violated public policy, because it restricted the district's discretion under the Civil Service Law to select one of the three highest ranked candidates on an eligible list. In the second case, different judges from the same appellate division held that the law does not prohibit a district from agreeing to promote the highest scoring individual, but that such an agreement must be clearly stated and may not be implied from past practice. In reversing the lower courts, the Court of Appeals concluded: "There is nothing in our state's constitution, the Civil Service Law or decisional law that prohibits an appointing authority from agreeing, through collective bargaining negotiations, on the manner in which it will select one of the top three candidates from an eligible list for promotion." The Court noted that the appointment of the highest scoring candidate, where compelled by collective bargaining, does not violate public policy, since appointees are required to serve a probationary term before their appointments become permanent, during which time the appointing authority has the ability to assess other traits not measurable by the competitive examination.

"Concerted" and "Protected" Activity

1. Matter of Village of Scotia v. New York State Public Employment Relations Board, 670 N.Y.S.2d 602, 241 A.D.2d 29 (3d Dept. 1998).
The Village of Scotia demoted a police officer distributing a letter to the Village Board of trustees, which the department alleged was abusive in nature. He also engaged in other conduct described as abusive. Public Employment Relations Board found that the demotion violated the employee's rights under Civil Service Law §209-a(1)(a) and (c). The Appellate Division affirmed that finding upon the grounds that such activity was protected concerted activity. PERB was, however, precluded from ordering, as a remedy, that the officer be restored to the rank of Sergeant with back pay.

Open Meetings Law

1. Goetchius v. Bd. of Educ of Greenburgh Eleven UFSD, N.Y.L.J (12/1/97) (2nd Dept.).
In this case, the Board of Education suspended a number of tenured teachers with pay, pursuant to §3020-a of the Education Law, and discharged several teacher associates, following an incident during which the teachers picketed a school event attended by emotionally disturbed students in violation of a court order. Based upon the teachers' disruptive conduct, the board prohibited the teachers from attending board meetings (and other events) held on school premises. Because emotionally disturbed students reside on school premises, the board was concerned that the teachers' would jeopardize the students' safety and emotional well being. The board offered to provide the teachers audio tapes of board meetings and also offered the teachers an opportunity to submit written questions or comments for the board's response. The teachers sued, claiming the district had violated the Open Meetings Law by excluding them from public board meetings. The Appellate Division ruled that the Open Meetings Law and the provision of the Education Law which requires that all board meetings be open to the public override those provisions in the education law which allow the board to adopt rules and regulations for the maintenance of public order on school property. Therefore, the court upheld the lower court's order annulling certain actions taken by the board at the closed meetings and awarded attorneys fees to the teachers.

Retaliation

1. AFSCME v. City of Buffalo, 30 PERB 3021 (3/26/97).
The full PERB board reversed the ALJ's decision dismissing the union's allegation that the employee was terminated by the city in retaliation for the union's efforts to secure a modified work schedule for the employee. PERB held that the city had no right to seek the employee's discharge merely because the union persisted in proposing a work schedule that the city found unacceptable, even assuming that the employee's work schedule was a nonmandatory subject of bargaining.

SCHOOL DISTRICT BUDGET VOTE AND BOARD MEMBER ELECTIONS

Budget Propositions

1. Appeal of Friedman, et.al., 36 Educ. Dep't. Rep. 431 (05/22/97).
Several district residents appealed to the commissioner, challenging the form of a proposition adopted by the local board of education which sought authorization from district voters to levy a tax to be used for several unrelated purposes, including: reconstruction of various school buildings, the purchase and installation of oil tanks, and the purchase of school buses. The challengers claimed that a separate proposition was required for each purpose and that the district violated state law by including multiple objects and purposes within a single proposition. The commissioner dismissed the appeal, holding that "no statute prohibits school districts from combining objects and purposes in a single proposition" nor is there any requirement that such multiple objects and purposes be interrelated.

Controversies Regarding Write-In Ballots

1. Appeal of Titus, 36 Educ. Dep't. Rep. 407 (04/21/97).
Three-quarters of a year after the winner of a school board election had been declared by the local board of education, the commissioner of education annulled the election results. The commissioner's decision resulted in the removal from the board of education of the candidate who previously had been declared the winner and who actually had served on the board of education during the nine month period that the commissioner's decision was pending. The commissioner determined that the district's election inspectors had incorrectly declared ten (10) write-in ballots void, where the voters wrote in the name of the candidate but failed to place either a "✓" or an "x" next to the name of the write-in candidate. Observing that there is no requirement in the Education Law that a voter place any kind of mark next the name of a write-in candidate, the commissioner credited to the "losing" candidate the 10 write-in votes previously invalidated by the district's election inspectors, which gave the "losing" candidate enough votes to be declared winner.

Electioneering

1. Appeal of Santicola, 36 Educ. Dep't Rep. 416 (5/05/97).
An unsuccessful school board candidate complained that the board of education permitted electioneering within 100 feet of the voting area in violation of §2031-a of the Education Law, by permitting the school yearbook committee to hold a Brooks Barbecue fund raiser during some of the hours of the election. In the words of the commissioner, the unsuccessful candidate claimed that "the wafting of tempting aromas from the barbecue induced voters to believe that supporting the budget propositions and reelecting [his opponent] would be as pleasant as savoring the delights of barbecued chicken...[and] that this electioneering could have swayed the 22 votes needed for him to prevail in the election." The commissioner determined that the challenger had offered no proof that the school board permitted electioneering to be conducted during the barbecue and dismissed the appeal, noting: "The holding of the barbecue at the same time as the election, even if the grill is

within 100 feet of the voting booth, does not constitute electioneering in and of itself. (See also. §2609(4-a)(a)).

Restrictions on Promoting the Budget

1. Application of Dinan, 36 Educ. Dep't. Rep. 370 (04/02/97).
A district resident asked the commissioner to remove the president of the board of education from the board for writing and submitting personal opinion letters for publication in the local newspaper. The letters urged district residents to vote in favor of the school district budget and were signed by the board president, using his title. The complainant contended that it was improper for the board president to use his title in signing these letters, and further contended that in writing these letters the president not only gave the impression he was speaking for the entire board, but also intimidated voters into supporting the budget. The commissioner rejected each of these claims and dismissed the petition calling for the president's removal. The commissioner observed that "[a]lthough an individual board member is not entitled to have his opinion published at district expense in board publications, this does not mean that he may not communicate his views at his own expense...and engage in partisan activity, provided school district funds are not used." The commissioner determined that district funds had not been used by the board president to express his views and also concluded that ordinarily there is nothing wrong with a board officer using his or her title in writing a personal opinion letter for publication in a local newspaper, provided that the officer does not purport to speak for the board and does not intentionally mislead readers.

School Board Eligibility

1. Appeal of Gravink, 37 Educ. Dep't. Rep. 393 (3/13/98).
A "gentlemen's agreement" observed for more than sixty years, which informally allocated eligibility for representation on the school board, based on where potential candidates resided in the district, was ruled invalid by the commissioner. The commissioner found that the gentlemen's agreement had no force and effect, because candidates residing anywhere in the district must be permitted to run for any vacancy on the school board. With few exceptions, the Education Law does not permit school districts to elect school board members based on the particular neighborhood, community or geographic area of the district in which they reside.

SCHOOL DISTRICT CIVIL RIGHTS LIABILITY

1. Hot v. Carmel Central School District et al., 994 F.Supp. 225 (S.D.N.Y.).
A school district's alleged failure to train personnel to deal with a student's "unpredictable" and ultimately violent behavior did not constitute a civil rights violation according to the Federal District Court for the Southern District of New York. In this case, a student who had previously displayed violent propensities to school district employees was killed by the police after firing a semi-automatic weapon into the home of his girlfriend. The student's parents brought a civil rights claim against the district contending that their son's death resulted from wrongful conduct on the part of school personnel and that this conduct was the result of the district's failure to train personnel in how to deal with their son's problems. In order to successfully bring a civil rights action under a failure to train theory, the individual suing must prove that district officials engaged in wrongful conduct that caused harm and that the wrongful conduct resulted from a failure to train employees that reflected a "deliberate indifference" to an individual's constitutional rights. According to court, to satisfy the deliberate indifference standard, the parents had to prove that district failed to train its employees for a circumstance it knew to a "moral certainty" would arise; that the training would have enabled school personnel to more skillfully deal with the student, and that the anticipated situation is one in which improper handling would frequently result in the deprivation of a citizens constitutional rights. The court rejected the parent's arguments, concluding that even if they could prove that school personnel did not respond properly to signs of the student's instability, a school

district can not be "expected to provide training directly applicable to the unpredictable conduct of an individual who was highly irrational, highly dangerous to others and self-destructive."

2. Bogan v. Scott-Harris, 118 S.Ct. 966 (1998).
The United States Supreme Court has recently ruled that local legislators, such as school board members, have absolute immunity from civil liability in connection with lawsuits arising out of their performance of legislative activities. This case does not shield school board members from lawsuits involving actions which are not legislative in nature.

3. Bd. Of County Commissioners of Bryan County, Okl. v. Brown, 117 S.Ct. 1382, 65 U.S.L.W. 4286 (4/28/97).
In this case, a county sheriff hired a deputy who had a criminal record that included convictions for assault and battery. While on duty, the deputy allegedly used excessive force against a suspect, in violation of the suspect's federal civil rights. The victim filed a §1983 lawsuit against the county, based upon the theory that the county should be held liable for its employee's conduct because the county had made a "policy" decision to hire the employee, with "deliberate indifference" to his criminal record. The county conceded that the sheriff who had done the hiring was the county's top law enforcement policy maker. The claimant prevailed on the "deliberate indifference" theory of liability in the Federal District Court and Circuit Court of Appeals. However, the U.S. Supreme Court, overturned the lower federal courts, holding that in order to prevail against the county, the claimant would have to demonstrate that the sheriff, as policy maker, knew, or reasonably should have known, based upon the deputy's criminal record, that there was a likelihood the deputy would violate peoples' federal civil rights, but hired the deputy anyway, with "deliberate indifference" to what would follow. Otherwise, according to the court, holding the employer liable for the employee's conduct would amount to nothing more than respondeat superior liability, in contravention of established legal precedent. The Supreme Court was unconvinced that the sheriff actually contemplated, or that he reasonably should have contemplated, that the deputy he hired had a propensity to violate anyone's constitutional rights.

SCHOOL DISTRICT NEGLIGENCE LIABILITY

1. Bell v. Bd. of Educ. of the City of New York, 90 NY2d 944 (1997).
Overturning a lower court ruling in favor of the district, the Court of Appeals ruled that the rape of a 12 year old girl by persons outside the school district was a "foreseeable" result of the district's negligent supervision of the girl, and restored a $2.25 million jury verdict in the girl's favor. The girl's sixth grade class had traveled to a local city park to attend a drug awareness fair sponsored by the school board and the local police. During the field trip, students were permitted to walk around on their own and participate in programs and activities of their choosing. The student testified that the teacher allegedly gave her permission to go to a local pizzeria for lunch. When it became time to return to school, the 12 years old girl did not arrive at the designated meeting place. The girl's teacher searched unsuccessfully for her, then returned to the school with the rest of the class without informing other teachers or security personnel at the event of the girl's disappearance. When the girl discovered that she had been left behind, she began to walk home, and was accosted by two boys who kidnaped and raped her. The Court of Appeals noted the general rule of law that an intervening criminal act by a third party cuts off a negligent party's liability, unless the criminal act is a "'reasonably foreseeable' consequence of circumstances created by" the negligent party, and concluded that the girl's rape in this case was a reasonably foreseeable consequence of the danger created by the district's negligent supervision during the field trip.

2. Schrader v. Board of Education of Taconic Hills Central School District, 671 N.Y.S.2d 785 (Third Dept. 1998).
In another case decided after the Court of Appeals ruling in Bell, the Appellate Division, Third Department, ruled that a school district could not be held liable for an "unforeseeable" sexual assault

by two male students against a female student. The court held that even if the teacher was negligent in allowing the three students to leave the classroom, thereby providing the opportunity for the sexual assault to occur on school property, the district was not liable, because the male students' actions were so "extraordinary and intervening" that they could not have been foreseen by the district. The court noted that although school districts are not insurers of student safety, districts do have the duty to adequately supervise students and are liable for foreseeable injuries caused by a lack of supervision. However, according to the court: " school personnel cannot reasonably be expected to guard against an injury caused by the impulsive, unanticipated act of a fellow student." In this case, the female student was unable to show that school personnel had any notice of physical or sexual misbehavior by the male students, and therefore she was unable to show that their conduct was foreseeable by the district.

3. Garcia v. City of New York, 222 A.D.2d 192, 646 N.Y.S.2d 508, 112 Ed. Law Rep. 409 (1st Dept. 1996), leave to appeal denied, 89 N.Y.2d 808, 655 N.Y.S.2d 888 (2/11/97).
The court upheld a determination that the New York City Central Board of Education was liable for the sexual assault of a kindergarten student by an older student, finding the school district was negligent in its duty to supervise the student. The student was assaulted in the school bathroom where he was allowed by his teacher to go unaccompanied, despite two memoranda instructing staff to the contrary. The court rejected the school district's argument that it could not be held liable since it had no notice of similar incidents or prior dangerous conduct by the attacker.

4. Meyers v. City of New York, 230 A.D.2d 691, 646 N.Y.S.2d 685, 112 Ed. Law Rep. 414 (1st Dep't), leave to appeal denied, 89 N.Y.2d 1085 (1997), reargument denied, 90 N.Y.2d 889 (7/1/97).
A school district that required its homeroom teachers to wait in the schoolyard five minutes before the end of an unsupervised lunchtime recess period was found liable for injuries to a teacher struck by a ball during the period, according to the court. The court ruled that the district failed to provide a safe workplace for its employees because the district did not post any rules governing the lunchtime recess in the school yard and the students basically ran the games themselves with no adult supervision. The court noted that the implementation of a reasonable plan of student supervision would have avoided the teacher's injury.

5. Murray v. Oceanside Union Free School District, Oaks School No. 3, (Nassau County Supreme Court, October 1997).
The court determined that the school district was strictly liable for any injuries sustained by a first-grader who was bitten on the finger by a Columbian boa constrictor during a classroom presentation. The court explained that under New York law, a person who keeps a "wild" animal will be held liable if the animal injures other persons, regardless of how careful the keeper was to prevent the injury. This is because a wild animal is deemed to have "vicious propensities" as a matter of law. In contrast, if a "domesticated" animal injures someone, the victim must prove that the animal had vicious propensities. The court ultimately concluded that the boa was a "wild" animal, despite the fact that it had lived in the district's nature study center for eight years, and held the district strictly liable for any injuries sustained by the first-grader.

6. Randi W. v. Muroc Joint Unified School District, 14 Cal. 4th 1066, 929 P.2d 582, 60 Cal. Rptr.2d 263, 65 U.S.L.W. 2513, 115 Ed. Law Rep. 502 (1/27/97).
School officials who provide misleading letters of recommendation on behalf of employees seeking jobs in other districts may be held liable for injuries sustained by students in the new district caused by the former employee's misconduct, according to California's highest court. In this case, several district administrators wrote letters of recommendation on behalf of a former employee, which induced another district to hire the employee. The letters highlighted the employee's favorable qualities, but failed to mention that the employee had been the subject of sexual misconduct charges and complaints. The employee allegedly sexually assaulted a student in the new district, and the student sued the employee's former district, claiming that the recommendation letters were fraudulent

and negligently misrepresented the character of the employee. The court held that individuals who write recommendation letters owe prospective employers and other persons a duty not to misrepresent the facts in describing the qualifications and character of former employees, if making such misrepresentations would present a substantial, foreseeable risk of physical injury to third persons. Although this decision is not binding in New York State, it represents a new theory of liability that could be tested in this state against school administrators, who are routinely asked to provide reference letters for former employees.

7. Hargraves v. Bath Central School District, 654 N.Y.S.2d 539, 116 Ed. Law Rep. 774 (4th Dept. 1997).
The court ruled that punitive damages are not available against a school district in a negligence action.

SEX DISCRIMINATION

1. Bryant v. Colgate University, 1998 WL 105606 (N.D.N.Y.).
Members of the women's hockey club sued Colgate University under Title IX for: (1) failure to provide reasonable opportunities for athletic scholarships for male and female athletes in proportion to the number of students in each gender participating in athletics; (2) failure to provide equivalent athletic benefits and opportunities to female and male athletes; and (3) failure to accommodate plaintiffs' interests in intercollegiate athletics. Plaintiffs sought varsity status for the club as a funded team, equal equipment, funding and benefits, an order directing the university to obtain ECAC League membership for the team, an award of damages, a declaration that Colgate had engaged in a past and continuing pattern and practice of discrimination against the women who play on the ice hockey team on the basis of sex, and an order directing Colgate to take remedial action to overcome the effects of its discriminatory practices. The first two claims were dismissed and the parties settled the third claim. The final settlement provided only for the women's team to be granted varsity status as a non-emphasized sport for five years. This action was brought as a motion for attorneys' fees in the amount of $183,000. The court found that the plaintiffs did achieve their primary objective of varsity status and were therefore entitled to attorneys fees, but reduced the claim to $70,000.

SEXUAL HARASSMENT OF STUDENTS BY FACULTY

1. Gebser v. Lago Vista Independent School District, 1998 WL 323555.
The United States Supreme Court ruled that a school district will not be liable for monetary damages under Title IX when a teacher sexually harasses a student unless the student can prove that a school official who has the authority to take corrective action to address the alleged discrimination and to institute corrective measures on the district's behalf has actual knowledge of the discrimination and demonstrates deliberate indifference by failing to adequately respond. The abuse in this case occurred off school grounds and was not reported to any school official until it was accidentally discovered by the police. The Court specifically declined to apply the lower standard of liability applicable to employers under Title to VII in cases involving teacher on student sexual harassment. However, the Court ruled that its decision did not affect a student's right to recover monetary damages against a school district under state law or against a teacher in his or her individual capacity under state law or under Section 1983.

2. Mirelez v. Bay City Independent School District, 992 F.Supp. 916 (S.D. Tex. 1998).
a federal district court in Texas refused to dismiss a §1983 deliberate indifference action brought by a student who was sexually molested by a substitute school teacher. In this case, a junior high principal was informed of a similar incident involving the teacher and another student but never reported the incident. The student alleged that the district's failure to have a policy which would have required the principal to report the earlier incident demonstrated a deliberate indifference to the constitutional rights of the student. The court ruled that there was a question of fact as to whether the

district had a policy which required reporting of incidents involving substitute teachers and whether, if there was such a policy, whether it was adequate. While the court allowed the case to proceed to trial, it noted that the burden on the student was a heavy one. Citing to the United States Supreme Court decision in Board of County Commissioners of Bryan County, Oklahoma v. Brown, 117 S.Ct. 1392 (1997), the court stated the standard "deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action".

3. Patchogue-Medford Congress of Teachers (PMCT) v. Patchogue-Medford UFSD, 30 PERB ¶3041 (9/9/97).

a school district may not unilaterally adopt and implement a policy prohibiting sexual harassment by members of the teachers' union, where such a policy contains investigatory and disciplinary procedures, according to the full PERB Board. The district argued that its sexual harassment policy did not contain either investigatory or disciplinary procedures that are mandatorily negotiable under the Taylor Law. NYSSBA submitted a friend of the court brief on the district's behalf arguing that Title IX, a federal law, requires the district to have such a sexual harassment policy in place, and therefore that any contrary state law or decision is preempted by the federal law. In rejecting the preemption argument, PERB determined that nothing in the federal law or regulations "manifest an intention by the federal government to exempt school districts from the collection bargaining obligations" of the Taylor Law. However, PERB noted that a preemption defense in the context of an applied setting, such as after negotiations had been undertaken and ended in impasse, was not before it and expressed no opinion on that issue. Furthermore, districts which already have a similar policy or past practice in place for the requisite period of time without being challenged by the union may be insulated from the impact of this decision. The school district has commenced action against PERB in federal district court.

4. Kracunas v. Iona College, 66 U.S.L.W. 1059, CA 2, No. 96-7128 (6/26/97).

The Second Circuit Court of Appeals ruled that the Title VII principles used to establish employer liability for hostile work environment sexual harassment may also be used to hold a college liable under Title IX for professor-student sexual harassment. Therefore, if an instructor in a supervisory role over a student uses his or her actual or apparent authority to further the harassment, or takes advantage of an agency relationship to do so, the school may be held liable under Title IX. If the instructor is in a position of a co-worker or lower level authority, the college is liable only if it lacked a complaint procedure or knew of the harassment and failed to take prompt remedial action. In this case, a student went to her English professor's office to discuss a failing grade on a paper. The professor forced the student to listen as he described his sexual fantasies and sexual history.

5. Doe v. Hillsboro Independent School District, 113 F.3d 1412, 65 U.S.L.W. 2812, 118 Ed. Law Rep. 834 (5th Cir. 5/27/97).

The court dismissed a §1983 action brought by the parents of a student who was raped by school custodian in an empty classroom. The parents argued that the district failed to protect the child from the rape by the janitor by failing to conduct a criminal background check on the janitor. The court cited to the recent U.S. Supreme Court decision in Board of County Commissioners of Bryan County v. Brown, where the court determined that municipal authorities can be liable under §1983 if a hiring decision "reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." Since the parents failed to show a nexus between any failure to check the criminal background of the janitor and the assault, no liability may attach to the municipal officers, according to the court.

6. Rosa H. v. San Elizario Independent School District, 106 F.3d 648 (5th Cir. 1997).

The court ruled that in the case of teacher sexual harassment of a student, in order to hold a district liable, a plaintiff must show, "that an employee who has been invested by the school board with

supervisory powers over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so."

SEXUAL HARASSMENT OF STUDENTS BY FELLOW STUDENTS

1. Davis v. Monroe County Board of Education, 74 F.3d 1186 (11th Cir. 1996), rehearing en banc, opinion vacated 120 F. 3d 1390 (11th Cir. 1997) (pet. for cert. filed, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

   The United State Court of Appeals for the Eleventh Circuit ruled that a student cannot sue a school district under Title IX for peer sexual harassment.

2. Rowinsky v. Bryan Independent School Dist., 80 F.3d 1006 (5th Cir. 1996), cert denied 117 S. Ct. 165 (1996).
   The Fifth Circuit Court of Appeals has ruled that a school district cannot be held financially responsible for student-to-student sexual harassment under Title IX unless the school demonstrates an institutional intent to discriminate by responding to the claims of abuse differently based on sex," i.e. treating the harassment of boys more seriously than of girls. This is so even if the school intentionally permits a hostile environment to exist.

3. Bruneau v. South Kortright Central School Dist., 935 F.Supp 162 (N.D.N.Y. 1996)(Motion for new trial denied 962 F. Supp. 301 (N.D.N.Y. 1997).
   The only court in New York State to address the issue has ruled that while Title IX allows students to sue a school district for peer sexual harassment, in order for the school district to be held liable in such cases, a student must demonstrate that the district provided no reasonable avenue of complaint or the school or school board received actual notice of the sexually harassing conduct and failed to take action to remedy it. Constructive notice, i.e., that the school district should have known of the harassment, is insufficient. The jury reached a verdict finding that harassment of the sixth-grade girl by boys in her class was misconduct, but not sexual harassment. The jury also found that the school district was not liable, in any event, because it responded adequately when it became aware of the situation.

4. Seamons v. Snow, 84 F.3d 1226, 64 U.S.L.W. 2718, 109 Ed. Law Rep.1103 (10th Cir. 5/8/96).
   The court dismissed a sex discrimination hostile environment claim brought under Title IX by a student. The student was a football player who alleged that his teammates seized him as he exited the shower, tied him naked to a towel rack, placed tape over his genital area, and exhibited him to his ex-girlfriend. After he complained to school officials, his coach brought him before the team, accused him of betrayal, demanded that he apologize and told him he should have "taken it like a man". When the student refused to apologize, he was dismissed from the team. The district's response was to cancel the final game of the season. The student transferred as a result of student ridicule. The student sued the school alleging that the school official's response to the incident was sexually discriminatory and harassing. The court ruled that the coach's dismissal of the incident as a prank and the student body's ridicule did not constitute conduct of a sexual nature. However, the student's first amendment action was allowed to continue because the student's speech in reporting the incident was not disruptive, did not invade the rights of other students, and was not school sponsored expressive activity.

5. Doe v. Petaluma City School District, 830 F.Supp. 1560, 85 Ed. Law Rep.1169, reconsideration granted, 949 F.Supp. 1415, 65 U.S.L.W. 2117, 115 Ed. Law Rep. 854 (N.D.Cal. 7/22/96).
   In this case, a 7th grade student was allegedly sexually harassed by fellow students and brought suit against the school district, counselor and principal, alleging that the defendants failed to stop the sexually harassing conduct by her peers. The court held that a school district may be liable for monetary damages under Title IX for student-to-student sexual harassment if (1) the student was

subjected to unwelcome harassment based on her gender; (2) the harassment was so severe or pervasive as to create a hostile educational environment; (3) the school district officials knew or should in the exercise of their duties have known, of the hostile environment and failed to take prompt and remedial action.

SECTION 803

1. Matter of Scanlan v. Buffalo Public School System, Clark v. Bd. of Educ. Kingston City School District Leister v. Board of Educ. Brentwood Union Free School District Kaufman v. Board of Educ. of Jericho Union Free School District, 90 N.Y.2d 662 (1997)

The New York State Court of Appeals ruled that teachers seeking retroactive membership in the New York State Teacher's Retirement System (TRS) pursuant to section 803 of the Retirement and Social Security Law satisfy their "substantial evidence" burden by submitting to their employers "nothing more than their own statements that they were eligible for retroactive membership in TRS." In ruling that the statements of the employees themselves was sufficient to meet the "substantial evidence" burden, the court noted that given the passage of time, it was unlikely that anyone other than the employees themselves could comment on their opportunity to join TRS. Furthermore, the court was troubled by the difficulty placed on employees to prove a negative by documentary evidence. The court noted while the statute does not require school districts to hold a hearing on the issue of eligibility, the court stated "[n]othing prevents school districts, which more likely than teachers have relevant records, from putting petitioners [teachers] under oath and testing the credibility of their assertions. School districts could then provide reasons why a particular teacher does not meet the requirements of the Retirement and Social Security Law, as long as the proffered bases are not arbitrary and capricious, the petitioner [teacher] will be denied retroactive membership." Once the court concluded that all of the teachers had met their "substantial evidence" burden, the court then considered whether the district in each case had a rational basis to deny the teachers' application for retroactive benefits. The court concluded that three out of the four districts were arbitrary and capricious, but that the Kingston School District had a rational basis upon which to deny retroactive membership. In the Kingston case, the teachers had been previously enrolled in TRS as full-time teachers in another district, and the district provided them with a form with a question asking whether they were members of the retirement system, and if so, what their retirement number and rate was. Given their past tenure as members of TRS, in addition to asking them whether they were members of the system, was a procedure that a reasonable person would view as a request to join the system. Therefore, the district had a rational basis upon which to deny the retroactive membership.

2. BOCES of Rockland County et al. v. State, 41 NY2d 753 (rehearing denied New York State Court of Appeals).

The New York State Court of Appeals refused to hear an appeal from a decision of the Appellate Division, Third Department which had ruled that Section 803 of the Retirement and Social Security Law does not violate the New York State Constitution. The Appellate Division had rejected the argument asserted by the school districts that payments made pursuant to Section 803 to pay for retroactive retirement benefits amount to an unconstitutional "gift of public funds." The Appellate Division observed that the challenged statute does not provide "extra compensation" to retirees, but rather, "merely extends retroactive membership and presents the possibility of increased pension benefits to *current* public employees who have been in continuous public service and always eligible to join the retirement system but for the fact that they were not informed of that right." Moreover, the court noted that the State Constitution specifically permits the Legislature to increase the amount of pension benefits for members of the state retirement system. The school districts are contemplating filing a motion asking the Court to reconsider its decision and grant their appeal.

3. Board of Education of the Haverstraw - Stony Point Central School District et. al. v. State of New York et. al., (Pending Action, Supreme Court, Albany County).
A declaratory judgment action was brought by the school district against the State and the Teacher's Retirement System (TRS) and the State and Local Employee Retirement System (ERS) challenging the constitutionality of section 803 of the Retirement and Social Security Law. Section 803 requires school districts to grant retroactive membership in the retirement system to certain employees, the expense of which largely falls on the school district. This action arose from an earlier action brought against the district when it denied a number of claims for retroactive membership.

4. White v. Freyman, 171 Misc.2d 767, 655 N.Y.S.2d 728, 117 Ed. Law Rep. 268 (N.Y. Sup. 2/4/97).
A teacher who was denied retroactive membership in the Teachers' Retirement System was prevented from appealing the decision to a higher court because she failed to notify the district within 90 days of the denial of retroactive membership that she intended to take further legal action against the district.

5. Chupka v. Bd. of Ed. of Binghamton City School Dist., 658 N.Y.S.2d 519, 118 Ed. Law Rep. 1095 (3rd Dept. 6/5/97)
The court upheld the school district's denial of a teacher's application for retroactive membership in the Teachers' Retirement System (TRS) pursuant to §803. The court concurred with the hearing officer's finding that the teacher's testimony was lacking in credibility, as evidenced by her "selective...ability to recall with clarity that she had not been advised that she was eligible to rejoin the Retirement System, while being unable to recall other relevant events during the same time period."

Similarly, in Guglielmone v. Sayville UFSD, the State Supreme Court for Suffolk County sustained the district hearing officer's determination that the testimony of the teacher in that case was without credibility, in view of the teacher's admission during the course of her testimony, that she had made misrepresentations to school officials in the past to obtain favorable employment benefits.

SEX OFFENDER STATUTES

1. People v. Afrika, 168 Misc.2d 618, 648 N.Y.S.2d 235 (N.Y. Sup. 8/15/96)
A state court ruled constitutional the Sex Offender Act, more commonly referred to as Megan's law, which provides for community notification of sex offenders released on parole. The state judge found that the law properly promoted public safety and did not impose additional punishment for those convicted before the law took effect in violation of the Constitution's ban on"ex post facto" laws

2. Doe v. Pataki, 120 F.3d 1263 (2nd Cir. 1997 *cert.denied* 118 S.Ct. 1066 (1998)
The United States Court of Appeals for the Second Circuit held ruled that community notification provisions of the Sex Offender Registration Act do not violate the constitutional prohibition against the punishment of criminal conduct which occurred before a law was passed and an injunction prohibiting notification has been vacated. However, a lower federal court has issued a second injunction based upon allegations of a denial of due process and equal protection in connection with the risk assessment provisions of the law which has the effect of preventing the implementation of the notification provisions of the law for individuals convicted before January 21, 1996. However, sex offenders may still be required to register with law enforcement authorities.

3. State v. Myers, 260 Kan. 669, 923 P.2d 1024 (Kan 1996) cert. denied, 117 S.Ct, 2508, 65 U.S.L.W. 3416, 3853, 3860 (6/27/97).
The Kansas State Supreme Court ruled that the provisions of the Kansas Sex Registration Act (similar to Megan's Law) is unconstitutional. According to the court, the law imposes punishment in violation of the Constitution's Ex Post Facto Clause.

OTHER

Access to School Events by Private School Students

1. Jacobson v. East Williston UFSD, 170 Misc.2d 93, 649 N.Y.S. 2d 1002, 114 Ed. Law Rep. 611 (N.Y. Sup. 10/23/96).
The court ruled a public school district can deny private school students, who are residents of the district, admission to a school Halloween party. According to the court, the provision of the Education Law requiring a district to open to the public any civic, recreational or social activity held on school premises (§414), does not apply when public school property is being used for public school functions.

Compensation

1. Cayuga-Onondaga Counties BOCES v. Sweeney, 89 N.Y.2d 395, 116 Ed. Law Rep. 749, 30 PERB ¶7501 (12/20/96), reargument denied, 89 N.Y.2d 1031 (3/25/97).
The Court of Appeals ruled that a BOCES was required to pay the prevailing wage to 41 temporary, seasonal employees who were hired to change light ballasts at a component school district, pursuant to a cooperative services agreement approved by the Commissioner of Education. The local Civil Service Commission had classified the employees and assigned them a salary. However, the State Commissioner of Labor initiated a proceeding to require that the employees be paid the prevailing wage, arguing that BOCES was acting as an independent contractor. The Court of Appeals affirmed a lower court ruling that the employees did not fall within an exemption for classified, graded, civil servants, because they were "ungraded" BOCES employees. In addition, the court held that the neither the Education Law's 90-day notice of claim requirement nor the 1 year statute of limitations were applicable to prevailing wage claims commenced by the Department of Labor against school districts and BOCES, because such claims "vindicate a public interest."

2. Appeal of Adler, et.el. v. City School Dist. of N. Tonawanda, 37 Educ. Dep't. Rep. 95 (8/13/97; reversed on Appeal, Albany Co. Sup. Ct., Special Term, April 10, 1998, unpublished decision).
In this case, a school district hired former BOCES employees as part of a district "takeover" of services previously provided by the BOCES. The BOCES' sick leave policy was more generous than the district's. In addition, when the BOCES hired the employees at issue, it had recognized and credited their prior service and started them above step one on its salary scale. However, when the school district took over the BOCES services and hired these employees, it refused to grant them the same sick leave and additional step increment that the BOCES had granted them. The acting commissioner of education ruled that employees were "entitled to retain the salary step they had achieved at BOCES, and to retain the number of sick days credited to them in BOCES' records at the time they were excessed by BOCES." The district appealed the decision in the Albany County Supreme Court, which reversed the acting commissioner's ruling, holding that it was based upon an error of law. According to the Court, the employees whose positions were taken over were not "teachers" but rather were counselors and social workers who were not entitled to the protections of the "takeover" provisions of section 3014-b of the Education Law.

Competitive Bidding

1. Acme Bus Corp. v. Board of Education of the Roosevelt Union Free School District, No. 230 (91 N.Y.2d 51 (1997))
New York's highest court ruled that a school board's award of bus routes contracts to the lowest bidders in the aggregate category, after conducting post bid negotiations with those bidders in order to obtain bid reductions to the exclusion of the lowest bidders in the individuals route category, did not violate state's competitive bidding statutes.

Coaches' Contracts

1. Appeal of Kimball v. Bd. of Educ. of Canastota CSD, 36 Educ. Dep't. Rep. 508 (6/29/97).
Observing that an "unsuccessful record, standing alone, does not establish that an individual is unqualified to coach," the commissioner of education admonished a school district for hiring a coach who was not a certified teacher, instead of hiring a certified the teacher who applied for the job. School officials evidently were displeased with the certified teacher's prior win-loss record as a coach, and therefore chose to hire as a coach a person who was not a certified teacher. The commissioner reminded the district of his regulations providing that a certified physical education teacher may coach any sport, and that teachers certified in other areas who have coaching qualifications and experience may coach if they satisfy certain first aid and course requirements. However, under these regulations, a district can only hire a coach who lacks teacher certification if no certified physical education teachers or other certified teachers with coaching experience apply for the position, and even then a temporary coaching license must be obtained from the commissioner before the uncertified coach may undertake coaching responsibilities.

Early Retirement Incentive

1. Auerbach v. Board of Educ. of the Harborfields CSD, 136 F.3d.104 (2d Cir.1998)
The court affirmed a lower court decision which had ruled that a school district did not violate the Age Discrimination in Employment Act (ADEA) when it negotiated a retirement incentive program with the teachers' union. The plan being challenged was offered to all teachers with at least 10 years of consecutive service with the district if they retired at the end of the school year in which they either turned 55 and completed 20 years of service in TRS, or reached 20 years of service with TRS and are 55 or older. The court ruled that the retirement plan did not violate federal law because eligibility to participate in the program was triggered by years of service, not age. In addition, the Court ruled that ADEA does not require an employer to provide identical early retirement incentives for employees of different ages. The court found that in order for a retirement incentive plan to be lawful it must meet the following criteria: the incentive must be voluntary, it must available for a reasonable period of time and it may not arbitrarily discriminate on the basis of age.

2. Dodge v. Bd. of Ed. for Schodack CSD, 655 N.Y.S.2d 123, 116 Ed. Law Rep. 1119, (3rd Dept. 3/13/97).
Teachers who filed irrevocable letters of resignation before their school district opted to participate in the state's early retirement incentive program are not entitled to participate in the program, according to the Appellate Division, Third Dept. The court reasoned that the language and purpose of the law providing for the early retirement incentive was to induce employees who would not otherwise leave the payroll to retire and thereby reduce the financial burden on the employer. Since the teachers already had resigned, there was no need to provide an inducement for them to retire, concluded the court. NYSSBA filed a friend of the court brief on behalf of the district.

Freedom of Information Law (FOIL)

1. Appeal of Martinez, 37 Educ. Dep't. Rep. 435 (3/23/98).
Section 2116 of the Education Law provides that "the records, books and papers belonging or appertaining to the office of any officer of a school district are...district property...and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof." From time to time this section of law is invoked by persons who wish to examine school district records but who for whatever reason, do not complete a FOIL request. Despite the expansive language of this section of law, which would appear to give the public nearly unfettered access to district records, the commissioner of education ruled in this case that access to school district records is regulated by FOIL. According to the commissioner, the exemptions from disclosure available under FOIL apply to disclosure of records which might otherwise be accessible

pursuant to some other provision of law. Therefore, if a person asserts a right to examine and copy records pursuant to section 2116 of the education law, a school district can withhold such records to the same extent that it could withhold them pursuant to the exceptions from disclosure contained in FOIL.

2. Mothers on the Move, Inc. v. Messer, 236 A.D.2d 408, (2nd Dep 1997).
The Appellate Division ruled that it was improper for a school district to refuse to make records available for public inspection that consisted of the names of applicants for employment or the names of the people who interviewed the applicants. Observing that the burden is on the public agency to demonstrate that the requested material is exempt from FOIL, the court held that the school district was not entitled to withhold the requested records on the stated grounds that releasing the information would constitute an "unwarranted invasion of personal privacy." The court concluded that the records did not contain sufficiently detailed information such that they "would ordinarily and reasonably be regarded as intimate, private information."

(Note: It bears mentioning that §89(7) of the Public Officers Law expressly provides: "Nothing in this article shall require the disclosure of...the name or home address of...an applicant for appointment to public employment..." There was no discussion of this statutory provision in the written decision of the Appellate Division.)

Grading and Attendance

1. Appeal of Ehnot, 37 Educ. Dep't. Rep. 648 (5/29/98).
In this case, the school district's attendance policy provided that once a student had exceeded a certain number of absences for a particular class, the student could not receive credit for the class, although the student would be permitted to audit the class. Consistent with longstanding decisions of the commissioner of education, the policy did not distinguish between excused and unexcused absences. However, the policy did contain an appeal process to: "1)allow students to challenge the number of absences on record; 2) ensure that no violation of the federal Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act has occurred; and 3) to give students a "last chance" under the policy by waiving the maximum allowance absence limit for extenuating circumstances – without regard to whether the prior absences are excused or unexcused." When the legality of the policy was challenged, the commissioner of education ruled in favor of the district, concluding: "It appears on its face that the policy is permissible in that it does not differentiate between excused or unexcused absences at any level." However, the commissioner cautioned that the policy must be applied in a "neutral manner." The decision signals to school districts that they may consider "extraordinary circumstances" as part of a policy on denying course credit to a student with excessive absences, provided that in doing so the district does not distinguish between excused and unexcused absences.

Open Meetings Law (Executive Session & Tape Recording)

1. Matter of Wm. J. Kline & Sons v. County of Hamilton, 235 A.D.2d 44 (3rd Dept. 10/97).
The Appellate Division faced the issue of whether the relevant sections of the State Public Officers Law, collectively referred to as the "Open Meetings Law" and "Freedom of Information Law" (FOIL), may require disclosure of tape recordings of properly convened executive sessions. The court observed that both FOIL and the Open Meetings Law require a public record of the vote of each board member whenever the board takes action by a formal vote during executive session. However, the court drew the line there, concluding that "memorialized discussions at duly convened executive sessions, which do not result in a formal vote, whether consisting of privileged attorney-client communications or otherwise...are not the type of governmental records to which the public has to be given access." In reaching this conclusion, the court reasoned that where the Open Meetings Law expressly enables a board to convene an executive session to preserve confidentiality,

it does not make sense to require disclosure, pursuant to FOIL, of records memorializing such confidential sessions.

Physical Education

1. Appeal of Wright, et.al. v. Bd. of Educ. of Middle Country CSD, 36 Educ. Dep't. Rep. 459 (6/10/97).
The commissioner ordered a school district to provide adequate supervision and direction to elementary school teachers assigned to teach physical education to their respective classes, where the "record established that ...the [teachers] were basically left to teach physical education on their own..." Commissioner's regulations require that teachers not certified to teach physical education must be provided with the "direction and supervision of a certified physical education teacher" in connection with their teaching of physical education.

School Bus Safety

1. Appeal of Moyer, 37 Educ. Dep't. Rep. 335 (2/20/98).
In this case, the commissioner of education upheld a school district's refusal to allow a student to transport her alto saxophone to school on the school bus. District policy prohibited students from carrying items on the school bus that would not "fit in their laps." The district adopted the policy to promote compliance with New York State Department of Transportation (DOT) regulations which prohibit transporting baggage, freight or other property in the aisle of a school bus or from carrying items that interfere with passenger seating space, safety or comfort. The commissioner determined that the district's policy was reasonable, because it applied equally to all objects over a certain size – not just musical instruments – and because the district allowed students who play musical instruments to stay after school to practice, thereby eliminating the need to transport instruments home.

Teacher Resignations

1. Appeal of Totolis & Richard v. Bd. of Educ. of Owego Apalachin CSD, 36 Educ. Dep't. Rep 476 (6/23/97).
The commissioner admonished the school board to discontinue its practice of changing the effective date of teacher resignations. According to the commissioner, Education Law §3019-a requires teachers to give a minimum of thirty days notice prior to terminating service, and that so long as this condition is met, a teacher's resignation need not be accepted by a board of education to become effective, since it takes effect on the date specified. In fact , the commissioner determined that "a board of education may not accept a teacher's resignation effective on some date other than that specified in the resignation." [emphasis added] In this case, near the end of the school year, two teachers submitted resignations effective in July and August, but before the resignations were accepted by the board of education, rescinded them and submitted new resignations with effective dates coinciding with the start of the school year, in order to preserve their health insurance benefits during the summer recess. The board accepted the later resignations but backdated them to reflect the dates the teachers had last rendered service to the district, and refunded the teachers' health insurance contributions, asserting that it only was obligated to pay health insurance premiums during the summer months for teachers who are scheduled to return to work in the Fall. The district contended that paying health insurance premiums for the two teachers who had announced that they were not returning in the Fall would amount to an unconstitutional gift of public funds. The commissioner admonished the district to discontinue its practice of changing the effective date of teacher resignations and further determined that paying health insurance premiums during the Summer months constitutes compensation for services rendered during the prior 10-month school year, and therefore, that such payments do not constitute a gift of public funds.

Unemployment Insurance Benefits

1. Claim of Makis, 233 A.D.2d 743 (3rd Dept. 11/21/96).
The court ruled that the placement of an individual's name on a substitute teachers list does not constitute a "reasonable assurance" of employment to the substitute teacher under the state's labor law. Therefore, the court ruled that the substitute teachers were eligible for unemployment insurance benefits. The court affirmed two decisions from the Unemployment Insurance Appeals Board in favor of substitute teachers seeking unemployment insurance benefits. In support of its holding that the district had not provided substitute teachers with a "reasonable assurance" of employment, the court noted that an independent agency had actually hired the substitute teachers. Districts that hire substitutes directly may be able to argue that this decision does not apply to them.

2. Claim of Odell, 233 A.D.2d 663 (3rd Dept. 11/14/96).
The court affirmed a decision by the Unemployment Insurance Appeal Board, which denied unemployment benefits to a teacher who was suspended with pay for a full year, pending the outcome of an investigation and 3020-a hearing to determine the validity of the charges against her, during which time she did not perform any services for the district. The teacher ultimately was terminated and thereafter filed for unemployment benefits. Under the state's labor law, a claimant must have worked at least 20 out of the previous 52 weeks prior to filing a claim to qualify for unemployment benefits. A "week of employment" is defined as "a week in which the claimant did some work in employment for an employer liable for contributions. Because the teacher performed no services for the school district during the period of her suspension, she was ineligible for benefits

Workers' Compensation Benefits

1. Majewski v. Broadalbin-Perth Central School Dist., 91 N.Y.2d 577 (1998).
New York State's highest court has ruled that the Omnibus Workers' Compensation Reform Act, which limits lawsuits against employers as third party defendants, applies only to lawsuits commenced after the law became effective on September 10, 1996. In other words, the law applies prospectively and does not limit claims commenced before the new law's September 10, 1996 effective date. Under the new law, employers can only be sued for "grave" injuries to their employees, which includes death or serious bodily injury, such as paralysis, total blindness, loss of a limb and severe brain damage.

Capital Area
School Development Association

July 16, 1998

Richard J. Ciprioni
New York State Department of Civil Service
Municipal Service Division

Capital Area School Development Association
July 16, 1998

I History of Civil Service in New York State
- A) Palmer v Geddes
- B) Constitutional Mandate

II) Structure of Civil Service Administration
- A) State Civil Service Department
- B) State Civil Service Commission
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III) Authority of Municipal Civil Service Agencies
- A) Jurisdictional Classification
  - 1) Unclassified Service
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- B) Position Classification
  - 1) Section 22 of Civil Service Law
  - 2) Classification Procedure
  - 3) Obligation of Appointing Officer
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IV) Examination Process
- A) State Master Examination Schedule
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VI) Initiatives to Improve Civil Service Administration
- A) Governor's Task Force
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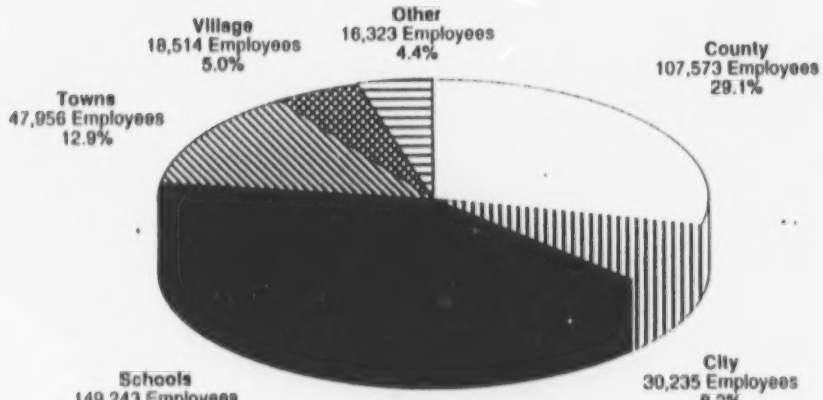
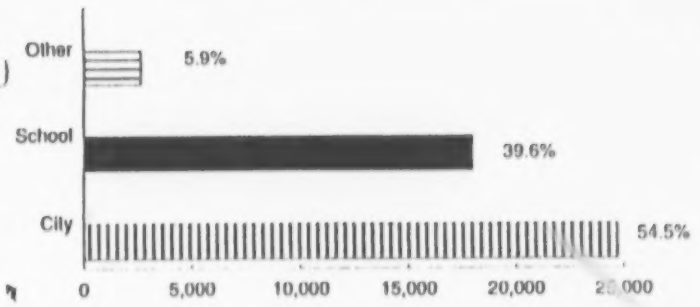
VII) Working with Municipal Civil Service Agencies
- A) Need for Communication
- B) Anticipating New Positions and Vacancies
- C) BOCES Personnel Administrators
- D) School District Seminars on civil service

GRAPH 4
LOCAL GOVERNMENT EMPLOYEES
BY CIVIL DIVISION–1997

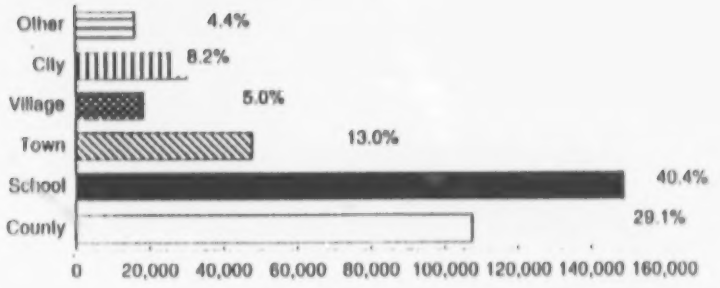


ALL AGENCIES
TOTAL 369,844

LOCAL GOVERNMENT EMPLOYEES ADMINISTERED BY CITY CIVIL SERVICE AGENCIES BY CIVIL DIVISION



LOCAL GOVERNMENT EMPLOYEES ADMINISTERED BY COUNTY CIVIL SERVICE AGENCIES BY CIVIL DIVISION



The Rule of Three

- **How do you determine who is reachable for appointment?**

  Count down 3 NAMES from the top of the list. Everyone RANKED ABOVE or TIED in score with this THIRD candidate is REACHABLE.

- **May I appoint anyone in the TOP 3 SCORES?**

  NO!! Only people ranked above or tied in score with the THIRD CANDIDATE FROM THE TOP OF THE LIST.

WHO IS REACHABLE FOR APPOINTMENT WHEN THERE IS ONE VACANCY?

Example 1

1	Julia	100	**reachable**
2	Nelson	95	**reachable**
3	Linda	90	**reachable**
4	Horace	85	
5	Kwah	85	
6	Joe	85	
7	Carey	80	

In this case you must choose from among Julia, Nelson, and Linda. This is because Civil Service law requires you to choose from among the 3 highest ranking candidates.

Example 2

1	Paula	90	**reachable**
2	Karen	90	**reachable**
3	Jim	90	**reachable**
4	Taylor	85	
5	Dell	85	
6	Pat	85	
7	Doug	80	

In this example, you must choose from among the candidates who received a score of 90. This is because there are three candidates with a score of 90 and Civil Service law requires you to choose from among the 3 highest **ranking** candidates.

Example 3

1	Pedro	90	**reachable**
2	Will	90	**reachable**
3	Lori	85	**reachable**
4	Marie	85	**reachable**
5	Dan	85	**reachable**
6	Jill	85	**reachable**
7	Tammy	80	

In this example, you may choose from among the top 6 candidates. This is because there are two candidates with a score of 90 and four who are tied with a score of 85. According to Civil Service law, in addition to the three highest ranking candidates, you are allowed to choose from candidates who are **tied** in score with the third highest **ranking** candidate.

Glossary of Municipal Civil Service Terms

APPOINTING AUTHORITY . . .

an officer, commission or body having the power to select applicants for employment.

CERTIFICATION . . .

a select list of those candidates on an eligible list who have indicated an interest in a particular position in a particular location.

CERTIFICATION OF PAYROLL . . .

Section 100 of the Civil Service Law requires the civil service agency to certify that all persons in the classified service receiving compensation for personal service are employed in accordance with the law and rules; individuals may not be paid without such certification.

CIVIL SERVICE COMMISSION (Local) . . .

established by law and consisting of three* Commissioners appointed to 6-year terms, one of whom is designated as the Chair of the Commission.

These Commissioners are appointed as follows:

1) Counties - by the legislative body except in those counties with a County Executive, in which event, appointment is made by the County Executive with the advice and consent of the legislative body;

2) Suburban towns - by the legislative body;

3) Cities - by the Mayor, City Manager or other authority having the general power of appointment of city officers and employees;

4) Regional - by written agreement duly approved by the governing board or body or each County or City participating;

*Except Monroe County and City of Rochester, which have five Commissioners.

CIVIL SERVICE COMMISSION (State) . . .

established by law and consisting of three Commissioners appointed by the Governor and confirmed by the State Senate for 6-year terms, one of whom is designated as President of the Commission and serves as President at the Governor's pleasure. (The President also serves as the head of the Department of Civil Service.)

CLASS OR CLASS OF POSITIONS . . .

one or more positions sufficiently similar in respect to duties and responsibilities that the same title may be used to designate each position in the class, which are allocated to the same salary or grade, with the same qualifications required and the same examination used to select eligible employees.

CLASS SPECIFICATION . . .

a written description of a title or class of positions which includes information on the duties and responsibilities of incumbents, minimum qualifications for appointment and other distinguishing features.

CLASSIFIED SERVICE . . .

all offices and positions in the civil service, exclusive of the military service, not included in the unclassified service; divided into four jurisdictional classes; competitive, non-competitive, labor and exempt.

CLASSIFY . . .

to group positions according to their duties and responsibilities and assign a class title.

COLLATERAL LINE . . .

titles which are not in a direct line to a promotion title but which are sufficiently comparable in duties and salary grades that incumbents may be allowed to compete in the promotion examination.

COMPETITIVE CLASS . . .

the jurisdictional class comprised of positions for which it is practicable to determine the merit and fitness of applicants by examinations which rank them against each other. All jobs in the classified service are competitive unless designated or approved otherwise by the State Civil Service Commission (see Jurisdictional Classification).

CONTINUOUS RECRUITMENT . . .

a type of examination for which applicants are accepted continuously. The test itself is administered periodically; successful candidates are added to the list for a specified period of time in rank order without regard to the date of the addition of their names to the eligible list.

DECENTRALIZED EXAMINATION . . .

a competitive examination for which all or part of the development, administration and scoring has been decentralized to the municipal civil service agency that will make use of the resulting eligible list.

DEMOTION . . .

the voluntary or involuntary placement or appointment of an employee to a position allocated at a lower salary grade.

DEPARTMENT OF CIVIL SERVICE . . .

New York State's primary personnel management agency, responsible for the development and maintenance of statewide agency personnel systems; the classification and allocation of State positions; and the recruitment and selection of candidates for State employment. The head of the Department is the President of the Civil Service Commission.

DEPARTMENTAL PROMOTION EXAMINATION . . .

a promotion examination open only to employees of the department in which the positions to be filled exist.

DEPUTY . . .

officer authorized by law to act generally for and in place of his/her principal.

DESK AUDIT . . .

a review and discussion of the duties and responsibilities of a position made at the employee's desk or other regular place of work. (Usually done in connection with a classification survey or decision).

DIRECT LINE OF PROMOTION . . .

positions are considered to be in direct line of promotion if they are in competitive class titles, in a career series, in a lower salary grade and the title has the same generic root: such as Clerk, Senior Clerk, Principal Clerk and Head Clerk.

ELIGIBLE LIST . . .

a list from which candidates for a competitive class position, ranked in order of their respective final examination ratings, may be appointed.

EXAMINATION . . .

a formal selection process which includes minimum qualifications, assessment measures, employment interviews and probationary periods; used to evaluate the qualifications and suitability of candidates for public employment. An examination for a competitive class position ranks candidates against one another. An examination for a non-competitive class position is based on the assessment of a candidate's education and experience as compared to the established minimum qualifications.

EXAMINATION ANNOUNCEMENT . . .

a document issued to inform potential applicants of an upcoming examination; the announcement contains but is not limited to the following information: the number and title of the examination, the date of the examination, filing information (including the last date applications will be accepted), minimum qualifications, type and scope of test(s), salary or salary grade, and a duties description; it may also contain vacancy information.

EXEMPT CLASS . . .

one of the four jurisdictional classes in the classified service; those offices and positions in the civil service of State or civil service divisions thereof, defined by Section 41 of the Civil Service Law and listed in the Municipal Civil Service Rules Appendices.

EXEMPT VOLUNTEER FIREFIGHTER . . .

a bona fide member of a volunteer fire department who served in said department for five years and is so certified to be an exempt volunteer firefighter in accordance with Section 200 of the General Municipal Law. Exempt volunteer firefighters may have additional but limited rights in the event of abolition of their position and protection against arbitrary dismissal.

INTER-DEPARTMENTAL PROMOTION . . .

a promotion from a position in one department to a position in another department in the same civil division.

JOB DESCRIPTION . . .

a detailed written summary of the duties and responsibilities of an individual job.

JURISDICTIONAL CLASSIFICATION . . .

designation by the Civil Service Commission of positions in the classified service in either the non-competitive, labor or exempt class; positions not so designated by the Commission are in the competitive class. Positions in the exempt,non-competitive or labor classes must be specifically named in the rules, subject to the approval of the State Civil Service Commission.

LABOR CLASS . . .

the jurisdictional class comprised of unskilled or manual labor positions for which there are no minimum qualifications established; applicants may be required to demonstrate their ability to do the job, or to qualify in such tests of their fitness for employment as may be determined practicable.

MERIT AND FITNESS . . .

phrase summarizing the requirement in the State Constitution that appointments and promotions shall be made according to merit and fitness to be ascertained, as far as practicable, by competitive examination; Civil Service is, hence, called a "merit system."

MINIMUM QUALIFICATIONS . . .

education and/or experience requirements denoting the minimum standards that all candidates are required to possess for examination or appointment.

NON-COMPETITIVE CLASS (NC) . . .

one of the four jurisdictional classes of the classified service. The Civil Service Commission may designate a position non-competitive (with the approval of the State Civil Service Commission) upon determining that a competitive examination is impracticable for filling the job. However, non-competitive class positions must be filled through examination or by appointment of candidates who meet the established minimum qualifications for the position. Such an examination may be similar to a competitive examination except that successful candidates are not ranked by score. Positions designated 55-a are deemed to be in the non-competitive class.

NON-COMPETITIVE PROMOTION (NCP) . . .

an examination administered when the number of employees qualified for and interested in promotion does not exceed the number of vacancies by more than two; the employee(s) may be nominated by the appointing authority, and, if successful on an appropriate examination, receive permanent appointment.

OPEN-COMPETITIVE EXAMINATION . . .

an examination open to all individuals who possess the announced minimum qualifications.

OUT-OF-TITLE WORK . . .

duties performed by an incumbent of a position which are not appropriate to the class to which the position has been assigned. Refer to Section 61.2 of the Civil Service Law.

PERMANENT APPOINTMENT . . .

an appointment made to a position in accordance with applicable laws, rules and regulations; a permanent appointment may provide rights and privileges, such as due process prior to dismissal; eligibility for promotion examinations, transfers, and future reinstatement and certain protections in the event of abolition of positions.

PERMANENT SERVICE . . .

generally, the date of the incumbent's original appointment on a permanent basis in the classified service; used for purposes of computing retention rights in the event of layoff. (For disabled veterans the date is 60 months earlier than the actual date; for non-disabled veterans the date is 30 months earlier than the actual date.)

POLICY INFLUENCING (Non-Competitive Class) . . .

positions in the non-competitive class whose duties are of a confidential nature or require the performance of functions influencing policy; positions are designated as policy influencing by the municipal civil service commission or personnel officer; employees in positions so designated are denied tenure by statute and are not afforded the protections provided to other non-competitive class employees (Section 42(2-a) of the Civil Service Law).

POSITION . . .

an assigned group of duties and responsibilities which can be performed by one person; commonly known as a "job," a position may be occupied or vacant; see municipal rules for definition.

PREFERRED LIST . . .

an eligible list established as a result of a reduction in force, or where otherwise provided by law, which consists of the names of displaced employees ranked by seniority; a preferred list must be used before any other means of filing

a position (except certain special military lists); the top acceptor on a preferred list must be appointed or the position left vacant ("Rule of One"). See Sections 80 and 81 of the Civil Service Law and the municipal civil service rules for procedures and legal prescriptions.

PROBATIONARY TERM . . .

the period of time, commencing upon a permanent appointment, during which an employee's performance on the job is assessed; the final step in the selection process.

PROMOTION . . .

generally, in the competitive class, an appointment from a promotion eligible list to a higher level position; in the non-competitive class, the appointment of an employee to a higher grade position without competitive examination.

PROMOTION EXAMINATION . . .

an examination for a higher level position open only to permanent employees who are currently serving in or who have served in qualifying titles for periods of time specified in the minimum qualifications.

PROVISIONAL APPOINTMENT . . .

a non-permanent appointment to a competitive class position which may be made when there is no appropriate or mandatory eligible list. See Section 65 of the Civil Service Law and refer to the municipal civil service rules for limitations on provisional appointments.

"RULE OF THREE" . . .

refers to the statutory provision that appointments must be made from among the three highest eligibles on an open-competitive or promotion eligible list who are willing to accept the position. (See also Section 61, Civil Service Law)

UNCLASSIFIED SERVICE . . .

all offices and positions in the civil service of the State and its civil divisions which are not in the classified service; unclassified service positions include, for example, all elective offices, officers and employees of the State/municipal Legislature, members of the teaching and supervisory staff of a school district, and certain positions in the State University of New York.

History of Civil Service

The civil service system in New York State is 115 years old. In 1883 Theodore Roosevelt, then a member of the New York State Assembly was successful in having a bill passed creating the first state civil service system.

Palmer V. Geddes

However, it was not until 1937 that a Court of Appeals decision found that employees of all political subdivisions were subject to civil service. Interestingly enough the case involved a school district, the Board of Education of Union Free School District of the Town of Geddes.

A carpenter, by the name of Calvin Palmer was discharged by the School District. Mr. Palmer claimed that he had a contract to work for the District at the rate of $2500 per year and was entitled to the salary for the duration of the contract. Mr. Palmer lost the case. The Court of Appeals concluded that the contract on which the action was based was in violation of the New York State Constitution.

Constitutional Mandate

The New York State Civil Service System is grounded in Article V, Section 6 of the New York State Constitution:

" Appointments and promotions in the civil service of the state and all civil divisions thereof...shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive…"

The Constitution mandates a civil service system that is premised on merit and fitness to be determined through competitive examination, so far as practicable. It requires all qualified persons be given an opportunity to compete for positions in the public sector. The State Civil Service Law was enacted to carry out the constitutional mandate.

Structure of State Civil Service

The New York State Department of Civil Service, located in Albany, is the central personnel agency for the Executive Branch of State government, which employs approximately 171,000 people. The Department also provides technical

services to improve the administration of the State's 105 municipal civil service agencies (excluding New York City), which cover approximately 370,000 local government employees.

The New York State Civil Service Commission is composed of three members: the President of the Commission, who is also the head of the Department of Civil Service, and two Commissioners. By law, not more than two of the three can be adherents of the same political party. Each serves a term of six years, and vacancies in the Commission are filled by appointment by the Governor., by and with the advice and consent of the Senate.

The State Civil Service Commission is responsible to ensuring that civil service is properly administered at the local level. This is done through periodic reviews of civil service administration and technical assistance.

Structure of Municipal Civil Service Administration

In New York State there are nearly 370,000 municipal employees subject to the Civil Service Law. Over 40% of

these employees serve in school districts. The system is administered locally by 57 county, 46 city, and 2 town civil service agencies. Civil Service Law permits a municipality to administer civil service through either a civil service commission or personnel officer. In a city that has not elected to establish its own civil service agency, civil service is administered by the county civil service agency. Consequently, city school districts may be under the jurisdiction of either a city or county civil service agency. Central school districts are under the jurisdiction of county civil service agencies.

The State Civil Service Department is required by law to provide technical assistance to local government in the proper administration of civil service. The Municipal Service Division, in which I serve, was created for that purpose.

Authority of Local Civil Service Agencies

The Civil Service Law grants a great deal of autonomy to municipal civil service agencies in administering the civil service system. Each municipal civil service agency is empowered to adopt and amend rules, consistent with the

provisions of Civil Service Law, in such areas as jurisdictional classification, position classification, examination, appointments, promotions, transfers, resignations, reinstatements. To adopt or amend an existing rule requires a public hearing and approval by the State Civil Service Commission. These Rules have the force and effect of Law.

It may be helpful to spend a few moments describing certain of these areas, and in particular the roles played by the municipal civil service agency, the state civil service commission, and school district administrators.

Jurisdictional Classification

The jurisdictional class of a position refers to the placement of a position in either the competitive, exempt, non-competitive or labor class. The underlying jurisdictional classification principle is that all positions, when first created, are competitive unless it can be demonstrated that it is not practicable to conduct a competitive examination, or unless there is a specific statutory reason in Civil Service Law or other statute for assigning the title outside the competitive class. This

follows from Article V, section 6 of the New York State Constitution that I quoted previously.

Local government positions are divided into two categories, the unclassified and the classified service.

The **Unclassified Service** (Section 35, Civil Service Law) includes positions of certain department heads authorized by law to hire and fire employees, teaching staff of a school district, elected officials and members of boards and commissions.

The **Classified Service** includes all positions assigned to the competitive, exempt, non-competitive and labor classes. The specific classes are described below.

Competitive Class

The competitive class (Section 44, Civil Service Law) is comprised of all positions for which competitive examination is practicable. Candidates for this class of positions must meet the minimum qualifications established by the civil service commission and are subject to competitive civil service examination. This includes a wide variety of

clerical, technical, administrative and professional positions. You may be surprised to know that of the 149,000 school district employees subject to civil service, 1 of 5, is filled (32,000 or about 21%) through the competitive process.

Exempt Class

The exempt class (Section 41, Civil Service Law) includes, among other offices and positions, deputies authorized by law to act for department heads, and other positions for which competitive or non-competitive examination is not practicable. In school districts such positions as Secretary to the Superintendent, School District Clerk, School District Treasure have been approved for placement in the exempt class. About 2000 school district positions have been approved for placement in the exempt class.

Section 41(1)(e) of the Civil Service Law requires that where more than one position in a title is placed in the exempt class, the specific number must be prescribed in the rules of the local civil service agency. Generally, a civil service commission sets no minimum qualifications for positions in the exempt class. Section 41(2) of the Civil Service Law also provides that upon occurrence of a vacancy

in an exempt class title, the local civil service commission must, within four months, determine whether the title is properly classified and should continue in the exempt class.

Non-Competitive Class

The non-competitive class (Section 42, Civil Service Law) includes positions for which minimum qualifications are established by the local civil service commission but for which competitive examination is not practicable. Appointments to positions in the non-competitive class consist of a review of the candidates' training and experience against the minimum qualifications established by the local civil service commission. This class includes many "blue collar" positions such as Equipment Operators and Mechanics, for which it would be difficult to prepare a competitive civil service examination. Nearly half of school district positions (73,000) are filled on a non-competitive basis.

The titles of positions in the non-competitive class must be specifically listed in the rules of the local civil service agency. Not more than one appointment should be made to such

position unless a different or unlimited number is specified in the rules.

Labor Class

The labor class (Section 43, Civil Service Law) consists of unskilled laboring positions. These positions generally have no minimum qualifications. This class may include labor or helper type positions. Over 40,000 school district positions are in the labor class.

Local Municipal Civil Service Rules

All positions in other than the competitive class are listed in the appendices to the local civil service rules. Whenever a position is added to the exempt, non-competitive or labor class, or to the unclassified service, the appendices to the rules must be amended according to the procedures provided in Section 20 of the Civil Service Law. All additions of positions to other than the competitive class made by the local civil service commission are subject to approval by the State Commission and must be filed with the Secretary of State before the title can be officially considered removed from the competitive class.

When positions are created they are presumed to be in the competitive class. In order to remove a position from the competitive class approval by the municipal civil service agency and the state civil service commission is required. It must be shown that competitive examination is not practicable.

A little insight into this process, we often hear that the position cannot be filled through the competitive process because the incumbent has access to confidential information. The State Civil Service Commission does not tend to approve requests on this basis. Any number of positions at both the state and local level are filled through the competitive process although the incumbents have access to confidential information. Think of positions in law enforcement, social services, and health care providers. In fact there are very few government position in which the incumbent does not have access to information that is confidential to some degree. We also often hear that the person must possess certain personal attributes that can not be assessed by competitive examination. That is correct. However, there is no other means available to determine with

certainty the possession of these personal characteristics other than evaluation during the probationary term.

Position Classification

This is an area on which there is perhaps the most controversy and it also one of the most important responsibilities of a municipal civil service agency. First let me quote the Civil Service Law:

"Before any new position in the service of a civil division shall be created or any existing position in such service shall be reclassified, the proposal therefor, including a statement of the duties of the position, shall be referred to the municipal commission having jurisdiction and such commission shall furnish a certificate stating the appropriate civil service title for the proposed position or the position to be reclassified. Any such new position shall be created or any such existing position reclassified only with the title approved and certified by the commission."

Position classification groups together positions that are sufficiently similar with respect to duties and

responsibilities so that they are treated the same for the purposes of title, minimum qualifications, rate of pay, selection method, as well as other personnel processes.

In the simplest terms, the objective of position classification is to identify the duties and responsibilities of each position in the organization, and based on their similarities and differences assign each to a "class". The assignment of the position to a class permits them to be treated similarly for a variety of personnel administration purposes. Municipal civil service agencies are empowered to classify and reclassify positions under the State Civil Service Law and their local civil service rules, which have the force and effect of law.

Each municipal civil service agency has also adopted a rule, which has the force and effect of law, that provides for the classification and reclassification of positions. Although there may be differences between rules adopted by various civil service agencies, there are certain common provisions.

1) Authority of Civil Service Agency

The civil service commission or personnel officer has the sole authority to classify and reclassify positions, prepare and maintain job class specifications, and establish appropriate minimum qualifications for each class.

2) Procedure for Classification of Positions

Before a position may be created or an existing position reclassified, the appointing officer must file a prescribed form with the commission or personnel officer, containing a detailed description of the duties and responsibilities of the position. After an analysis of the position, the commission or personnel officer allocates the position to an existing class, or if no appropriate class exists, creates a new class and prepares a class specification for such new class.

3) Obligation of Appointing Officer

Whenever a permanent and material change is made in the duties and responsibilities of any position, the appointing officer must file a detailed description of the duties and responsibilities of the position with the commission or personnel officer.

Any appointing officer may make application to the commission or personnel officer for the classification or reclassification of any position in his/her department.

4) Rights of Employees

An employee may make application to the commission or personnel officer for the reclassification of his or her position. Such request must be accompanied by the reasons in support of the request, and must show changes in the duties and responsibilities of the position.

5) Notice and Appeal

The commission or personnel officer must give reasonable notice of any proposal or application for change in classification to the appointing officer and the employee or employees involved.

An employee may appeal the classification of his or her position to the municipal commission or personnel officer.

No employee, either by classification or reclassification, change of title or otherwise shall be promoted, demoted, transferred, suspended or reinstated, except in accordance with the provisions of Civil Service Law and Rules.

Additional points to be aware of:

1) Civil Service agency assigns the position to a class; it does not determine what duties will be assigned to a position.

2) The civil service agency may create a new class. The school district is not restricted to titles that already exist in a particular school district or even in any other school district.

3) The civil service agency in classifying the position prepares an official job description or class specification that describes the typical duties performed and prescribes the qualifications necessary for appointment.

The job description is an important document and should be carefully reviewed by the appointing authority, supervisor, and the incumbent, if there is one. It is the job description that is the used to prepare the examination. Also, the job description contains the qualification necessary to qualify for appointment to the position. Although as an appointing authority you may wish to appoint the "ideal" candidate, civil service is obligated to

establish the minimum qualifications at a "reasonable" level below which it would not be reasonable for the person to perform the duties of the job. The minimum qualifications must be related to the job and only contain bona fide occupational requirements.

Examination Process

Most municipal civil service agencies rely upon the State Civil Service Department to provide examinations. We prepare and rate nearly 4000 examinations per year for municipal government. We also provide examinations on Decentralized basis for certain entry-level positions such as Custodians, and various clerical positions.

Municipal civil service agencies request our assistance based on a Master Examination Schedule that outlines the frequency in which an examination is offered. Generally, examinations are offered every year for the most populous titles, and every other year for the remainder. Unusual positions are not included in the Master Examination Schedule, and are scheduled as soon as possible. The Decentralized Examinations are provided to municipal civil

service agencies and can be administered as often as they deem necessary and are scored locally.

Appointment Process

The element of the appointment process for competitive class positions that garners the most attention is the "rule of three". Simply stated it is not a rule at all, but rather Section 61 of the Civil Service Law that states that:

'Appointment or promotion from an eligible list shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept appointment."

There is no other provision in Civil Service Law, I believe, that has attracted so much attention from administrators, public employees, those seeking public employment, legislators, and those who have studied the civil service system academically. Yet the "rule of three" has withstood the attention unchanged. In your packet I have included an information packet on the Rule of Three and determining who is eligible and reachable for appointment.

Initiatives to Improve Civil Service Administration

In 1995, Governor Pataki appointed a Task Force on the New York State Civil Service System. That Task Force, headed by Commissioner George Sinnott of the Department of Civil Service issued a report titled "Quality Standards/Innovative Applications, Prescriptions for Improving New York State's Civil Service System. Among the prescriptions for improvement of civil service identified in the report was increasing the use of band scoring.

Band Scoring

Band scoring is based on a mathematical model that enables the consideration of a group of scores to be functionally equivalent) e.g. all scores from 90 to 95 are given a band score of 95 and are considered equivalent. By so doing the field of candidates who can be considered for appointment opens considerably. The State Civil Service Department uses band scoring on all state tests, as appropriate both open competitive and promotional examinations.

Examination Results

Another criticism of the civil service system related to the appointment process is the time it takes to report test results. In 1994, the State Civil Service Department took

an average of 85 days to report test results, that was reduced to an average of 39 days in 1996/97. Additionally, the Department has expanded the use of personal computer based tests that are instantly scored at the test site.

Use of Technology

Also related to this effort the Department electronically provides examination results to municipal civil service agencies, which permits them to download the results directly into their computer system that should reduce the time necessary for the municipal agency to notify candidates and establish eligible lists.

The Commissioner Sinnott recently announced a plan to loan computer equipment to municipal civil service agencies to allow them to take full advantage of these technological services. We are in the process of loaning over 400 computers to local government to be used for PC administered testing, downloading of examination results as well as other technological services provided by the State Civil Service Department. Training is also being provided to those agencies seeking our technological services.

I might add that the State Civil Service Department has been recognized at the local, state, national, and international level for its efforts to revitalize the merit system in New York State. Most recently, the Department was chosen to receive the 1998 Public Service Excellence Award, co-sponsored by the Public Employees Roundtable and the National Governor's Association. The Department was selected from more than 200 nominations.

Communication with Municipal Civil Service Agencies

Speaking from a legal standpoint, the Civil Service Law requires that it is the duty of all officers of the state and any civil division to conform to and comply with and to aid in all proper ways in carrying into effect the provisions of civil service law and the rules established pursuant to law. Further, the civil service agency is required to review your payroll and certify that each employee is serving in accordance with civil service law and rules. If, by chance, certification is refused, any officer who willfully pays or authorizes payment of salary to any person with the knowledge that certification has been refused is guilty of a misdemeanor. Moreover, an action may

be taken in supreme court to recover any sums illegally paid from appointing authorities.

I have found that in those municipalities in which there is good communication between the appointing authorities and the civil service agency there are fewer disputes over the limitations of the civil service system. Civil Service administrators, at both the state and local levels, recognize the need to appoint and retain staff who is capable of performing all of the duties of the position and operate effectively in your programs. I have found that municipal administrators whether they are in government at the state, county, town, village, or school district level appreciate their responsibility as public administrators to provide opportunities for government employment to all qualified persons.

Over the past three years I have been working with a group of BOCES Personnel Administrators who are seeking a greater understanding of the civil service system and an opportunity to share their particular needs with me. I believe this effort to have been most beneficial and will lead to more such activities in the future.

I also recently conducted a seminar on civil service in conjunction with the Nassau County Civil Service Commission attending by over 100 school administrators in Nassau County. More of such seminars are being scheduled this fall and winter.

These efforts are being undertaken to improve the communication between civil service administrators and school officials. As I mentioned, over 40% of the employees under civil service in New York State are employed by school districts.

I strongly suggest that you arrange for you and or a member of your staff to meet with civil service administrators in your county or city. I have found that discussions with civil service before positions are created are beneficial to all parties and generally facilitate the appointment process. You should be sure that they are aware of any new positions being considered and any vacancies you may anticipate so that they can work with you in facilitating the appointment process.

Ask your civil service agencies for a copy of their civil service rules, copies of the job class specifications for

your district, and a list of the titles of positions that have been removed from the competitive class.

In conclusion, the civil service system in New York State has been revitalized and efforts have been made to meet the needs of managers at both the state and local levels effectively and on a timely basis. The State Civil Service Department is continually seeking improvements in civil service administration in harmony with the State Constitutional mandate of merit and fitness. We welcome any opportunity to meet with you and discuss your needs and any suggestions you may have that would allow us to meet those needs.

ADA BASICS IN A NUTSHELL

I. ADA FACTS OF LIFE

A. The Primary Purpose of the ADA:

To enable qualified individuals to find and hold a job.

B. What the ADA Prohibits:

The ADA prohibits discrimination against **qualified individuals with a disability** with regard to job application procedures, hiring, promotion, termination, compensation, job training, and other terms and conditions of employment.

C. Who is entitled to ADA Protections:

Qualified individuals with disabilities who can perform the essential functions of the job, with or without reasonable accommodation.

D. What Employers are Covered by the ADA:

Employers with 15 or more employees (including part-time employees) working for 20 or more calendar weeks in the current or preceding calendar year.

II. KEY DEFINITIONS OF ADA TERMS

A. "A Qualified Individual With a Disability":

A person with a disability who meets legitimate job requirements (such as education, experience, skill requirements) AND who can perform the "essential functions" of the job, with or without reasonable accommodation.

B. "A Disability":

1. A physical or mental impairment that substantially limits one or more major life activities;

2. A record of such an impairment; or

3. Being regarded as having such an impairment.

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C. "Impairments":

1. A "physical impairment" is defined under the ADA as a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genital, urinary, hemic and lymphatic, skin and endocrine.

2. A "mental impairment" is defined by the ADA as any mental or psychological disorder (including mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities).

D. "Major Life Activities":

Activities that an average person can perform with little or no difficulty (e.g., walking, reading, breathing, listening, etc.).

E. "Substantially Limited":

An impairment substantially limits one or more major life activities if an individual is unable to perform, or is substantially limited in his/her ability to perform, such activity.

F. "Reasonable Accommodation":

Any reasonable modification or adjustment to the job/work environment that will enable a qualified individual with a disability to participate in the application process or to perform essential job functions. **(Employers are not required to make an accommodation if it would impose an "undue hardship" on the employer.)**

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THE GOLDEN RULES

for

PRE-OFFER INQUIRIES UNDER THE ADA

I. Ask questions about the job applicant's ability to perform the essential functions of the job, with or without reasonable accommodation.

II. Stay away from questions which are likely to elicit disability-related information:

A. Never ask about the nature of a disability;
B. Never ask about the severity of a disability;
C. Never ask about the conditions causing the disability;
D. Never ask about the expected prognosis for a disability; and
E. Never ask whether the job applicant will need special treatment and/or leave because of a disability.

III. If in doubt, leave it out.

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WARM UP EXERCISE

QUESTIONS	ANSWERS
I. BACKGROUND INFORMATION	
1. Which of the following individuals are reported to have been afflicted with mental illness: (a) Abraham Lincoln (b) Ludwig Von Beethoven (c) Virginia Woolf (d) Winston Churchill (e) Lionel Aldridge (f) Leo Tolstoy (g) Robert Schumann (h) Eugene O'Neill (i) Isaac Newton (j) Michelangelo (k) Jimmy Piersall (l) Charles Dickens (m) John Keats (n) Vincent Van Gogh	
2. Which is more prevalent in American society: (a) serious mental illnesses, or (b) cancer, or (c) diabetes, or (d) heart disease?	
3. A serious mental disorder will strike how many people in their lifetime: (a) 1 in 100 Americans (b) 1 in 25 Americans (c) 1 in 10 Americans (d) 1 in 4 Americans	

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QUESTIONS	ANSWERS
4. The National Institute of Mental Health ("NIMH") has conducted studies of major mental illness in the United States. Approximately how many people (according to NIMH) are afflicted with schizophrenia, depression, phobia, panic disorder and/or other mental illnesses or disorders? (a) 1 million (b) 5 million (c) 25 million (d) 55 million (e) 100 million (f) 450 million	
5. Preliminary studies have been done regarding the incidence of diagnosable mental disorders in children/adolescents in the United States. According to such studies, the frequency of a diagnosable mental disorder in children/adolescence is: (a) 1 in 2 children/adolescents (b) 1 in 5 children/adolescents (c) 1 in 10 children/adolescents (d) 1 in 25 children/adolescents (e) 1 in 100 children/adolescents	
II. PSYCHIATRIC DISABILITY	
1. Under the ADA, what does the term "disability" mean?	
2. What is a "mental impairment" under the ADA?	

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QUESTIONS	ANSWERS
3. Which of the following examples constitute mental impairments under the ADA: (a) Major depression (b) Bipolar disorder/manic depression (c) Panic disorder (d) Obsessive compulsive disorder (e) Post-traumatic stress disorder (f) Schizophrenia (g) Personality disorders (h) Current illegal drug use (i) Compulsive gambling (j) Kleptomania (k) Pyromania (l) Obnoxious personalities (m) Irritability (n) Chronic lateness (o) Poor judgment	
4. If you have an impairment, do you automatically have an ADA-protected disability?	
5. What kind of activities constitute "major life activities" under the ADA: (a) Walking (b) Talking (c) Learning (d) Thinking (e) Concentrating (f) Interacting with Others (g) Caring for oneself (h) Performing manual tasks (i) Working (j) Sleeping (k) Being able to reproduce	
6. To establish that s/he has a psychiatric disability, must an employee always show a substantial limitation on his/her ability to work?	
7. To determine if an impairment substantially limits a major life activity, should the employer consider the corrective effects of medications or other treatment?	

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QUESTIONS	ANSWERS
8. Your client has a middle aged employee who has experienced major depression for approximately 12 months. Although he shows up for work, he is extremely moody, socially withdrawn, suffers from serious insomnia and has severe problems concentrating. Does this employee have an ADA disability?	
9. You are employed at Carpet Warehouse. You have bipolar disorder and have taken medication to control it for several months. Prior to starting medication, you experienced increasingly severe and frequent cycles of depression and mania. At times, you became extremely withdrawn socially and had problems caring for yourself. Fortunately, the medication has significantly diminished your bipolar symptoms. Your doctor advises you, however, that the duration and manifestation of your bipolar disorder is indefinite and be potentially long-term. Do you have a disability under the ADA?	
10. You work at a large Wall Street law firm and share an office with a brilliant lawyer named Fred. You and Fred each bill 3000 hours per year (thereby bringing great happiness to your employer). To your amazement, Fred found time to fall in love with an artist from Hoboken. Although Fred is remarkably witty, charming and well-balanced for someone who spends so much time at the office, his girlfriend put an end to the relationship, declaring that she was tired of competing with the law firm for Fred's love and attention. Fred was extremely upset for approximately one month immediately after the break up, went to a therapist and received a diagnosis of adjustment disorder. His mood improved within several weeks and his therapist confirmed that Fred is not expected to experience any long-term problems as a result of the breakup. (a) Did/Does Fred have an impairment? (b) Did/Does Fred have a disability for purposes of the ADA?	

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QUESTIONS	ANSWERS
III. DISCLOSURE OF DISABILITY	
1. Does the employer ever have a right to ask an employee, or potential employee, whether s/he has a mental/emotional illness or psychiatric disability?	
2. If so, may the employer ask such questions: (a) On a job application? (b) During the initial job interview? (c) After the employer makes an offer of employment, but before the employee has commenced work? (d) During employment?	
3. You are The Employer. An applicant for a secretarial position tells you that he needs to take the typing test in a quiet location because of "a medical condition." Under the ADA, do you have the right to make any disability-related inquires at this point?	
4. You are, once again, The Employer. You have extended a job offer to Sam, an ostensibly outstanding candidate. You have advised Sam, however, that the offer is contingent upon his successful completion of a pre-employment medical examination. This examination includes a psychiatric component. Is the examination permissible under the ADA?	
5. During the pre-employment medical examination, you find out that Sam is schizophrenic. You are uncomfortable with the prospect of hiring a schizophrenic and you kindly, gently advise Sam that he should look for work elsewhere. Is your action permissible or impermissible under the ADA?	

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QUESTIONS	ANSWERS
6. Your client has hired Zelda X as a bicycle messenger. Within a short time, your client realizes that Zelda's job performance is less than perfect. For example, Zelda (i) has not learned the route that she is required to take on a daily basis, (ii) often fails to deliver letters and packages to the correct addresses, and (iii) on occasion, fails to deliver the letters and packages to any address. Your client convinces you that Zelda is not adequately performing her most essential job function. Should you advise your client to compel Zelda to undergo a medical examination, including a psychiatric examination?	
7. Your client, Josephine's Luxury Limos ("Company"), employs a driver, Joe, who has bipolar disorder. Joe is one of the Company's best drivers. He had a manic episode in 1997 which started when he was transporting a group of high level corporate executives to around-the-clock meetings. While he was going through the manic episode, Joe behaved in a manner that posed a direct threat to himself and others (e.g.: he repeatedly drove Josephine's favorite limousine in a reckless manner). Joe took a short leave of absence and has returned to work. Since his return, Joe has performed at his usual high level and the Company is delighted to have him back. The Company has recently been requested to assign him to drive for another group of high level corporate executives who may become enmeshed in around-the-clock labor negotiations for several weeks. Your client is concerned that the around-the-clock job will trigger another manic episode and that, as a result, Joe will drive recklessly and pose a significant risk of harm to himself, the clients and other people. There is no indication that Joe's bipolar condition has changed or that his manic episode was not triggered by his 1997 around-the-clock driving assignment. Do you advise your client to make disability-related inquires and/or require a psychiatric examination? If so, what is the basis for your recommendation?	

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QUESTIONS	ANSWERS
8. Your client, Lu-Lu's Luxury Sedans, employs Hildegaard, a female employee who took a leave of absence during which she was hospitalized for depression. After her hospitalization, Hildegaard had her medication for depression adjusted. Hildegaard now seeks to return to work. Under the ADA, may your client request that Hildegaard submit to a fitness-for-duty examination? If so, what is the basis for the request and what is the proper scope of any such examination?	
9. Your client, Lu-Lu's Luxury Sedans, has requested that you review the personnel files of certain employees, in connection with a disciplinary grievance. Coincidentally, Hildegaard's personnel file is included among the files given to you for review. During your review, you realize that your client has included information about Hildegaard's depression in her personnel file. It is your client's standard business practice to include all documents about employees in the personnel file(s). What, if any, advice do you give your client about their personnel files?	
10. The Human Resources Manager at Lu-Lu's Luxury Sedans is working with you on the disciplinary grievance and mentions that she has had a number of employees ask her about Hildegaard's mental health. What, if any, advice do you give the HR Manager with regard to information requested (about Hildegaard's health) by the following individuals/entities: 1. Hildegaard's co-workers; 2. Hildegaard's supervisor and manager; 3. The Company's first aid and safety officer; 4. Government officials investigating your client's compliance with the ADA; 5. New York State Workers Compensation Office and the Worker's Compensation insurance carrier; and 6. The Company's insurance carrier.	

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QUESTIONS	ANSWERS
IV. REQUEST FOR REASONABLE ACCOMMODATION	
1. What are the magic words an employee must use when s/he decides to request reasonable accommodations from an employer?	
2. Who may request reasonable accommodation on behalf of the individual with the disability?	
3. Do requests for reasonable accommodation need to be in writing?	
4. When is an individual with a disability supposed to request a reasonable accommodation to do the job?	
5. What, if any, right does the employer have to demand documentation in response to a request for reasonable accommodation?	
6. Your client's employee, Gus, has just completed a major project and has asked to take a few days off to rest. Gus provided the employer with no other information about the reason for the rest request. Has Gus put your client on notice that he is requesting reasonable accommodations?	
7. An employee presents your client with a notice from a doctor stating that she is having "a stress reaction" and needs to take one week off. The employee's spouse subsequently telephones the client to say that the employee is falling apart mentally, is disoriented and that the family is seeking to have her hospitalized. The spouse requests information about procedures which will allow the employee to extend her leave. The spouse also promises that he will provide the necessary information as soon as possible and that he will need extra time to provide that information (because he is too busy trying to handle the immediate crisis). Has the employer been put on notice that his employee has made a reasonable accommodation request?	
8. An employee requests time off because he is "stressed and depressed." Has the employer been put on notice that the employee is requesting reasonable accommodation?	

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QUESTIONS	ANSWERS
9. Your client does not believe the employee's claim that he is disabled and needs accommodation. Your client asks you whether she can require the employee to be examined by a doctor selected by the Company. What's your answer?	
10. Which of the following examples constitute(s) reasonable accommodation for individuals with psychiatric disabilities: (a) time off from work; (b) modified work schedule; (c) physical changes to the work place or equipment; (d) modification of work place policy; (e) a change in supervisors; (f) adjusting the supervisory methods; (g) providing a job coach; (h) monitoring the employee's medication; and (i) reassignment to a different position.	
V. CONDUCT	
1. Your client is a grocery store. An employee named Jaromir works the cash register. Your client discovers that Jaromir is stealing money from the register. When he confronts Jaromir, the employee admits to the theft but claims that he could not help himself because of his psychiatric disability. What, if any, discipline may the employer implement?	
2. An employee tampers with and incapacitates computer equipment at the job site. When confronted about his conduct, the employee claims that she couldn't help herself, that she engages in this type of conduct because of her psychiatric disability. What, if any, discipline may the employer impose? Does your answer change if the employer has not disciplined other employees without disabilities for the same conduct?	

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QUESTIONS	ANSWERS
3. Your client employees an individual named Muffy to work in the stock room. Muffy has a known psychiatric disability, has no customer contact and no regular contact with other employees. Over the last month, Muffy has come to work appearing increasingly disheveled. Her clothes appear to come from thrift shops, are ill-fitting and, often, torn. She also seems to become increasingly anti-social. Several co-workers have indicated that when they try to engage her in casual conversation, she responds curtly and/or glowers and stomps away. When Muffy has to talk to a co-worker, she tends to be abrupt and rude. Notably, Muffy's work is fine and she accomplishes on a daily basis everything that she is expected to accomplish. Your client has a handbook (that you reviewed and revised), which expressly requires that employees maintain a neat appearance at all times. The handbook also states that employees are expected to be courteous to each other. When your client disciplines Muffy because of her violation of the Company's policy on appearance and treatment of co-workers, Muffy explains that her psychiatric disability is cyclical and that during this phase of the cycle, her appearance and demeanor deteriorate. What, if any, ADA issues are triggered by your client's determination to discipline Muffy for her appearance and demeanor?	
4. You represent a Research Institute which employs a reference librarian named Big Joe ("BJ"). BJ frequently loses his temper at work, shouts at library users and co-workers and creates a generally disruptive atmosphere in the library. Your client has a progressive discipline policy and implements discipline against BJ when he loses his temper and acts in a disruptive manner at work. After your client implements the second step of the progressive discipline – a three-day suspension – BJ advises the Human Resources Manager that he has a psychiatric disability which causes his erratic and disruptive behavior. BJ requests a leave of absence so that he can seek treatment. Will your client be in ADA "hot water" for disciplining BJ?	

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QUESTIONS	ANSWERS
5. Big Joe's friend Li'l Joe (LJ) also works at the Research Institute. LJ's responsibilities include extensive telephone, fax and e-mail contact with the Company's public health reps, off-site case managers, and vendors -- who all depend upon LJ to answer urgent questions and resolve on-the-spot crises. LJ suffers from a major depressive condition. He is often late for work because the medication he takes to alleviate the depression leaves him feeling extremely groggy in the morning. The employer requires LJ to be at work from 9:00 a.m. to 5:30 p.m. Much to everyone's irritation, LJ arrives anywhere from 9:00 to 10:30 on workdays. The employer disciplines LJ for tardiness and warns him that continued failure to arrive in a timely manner during the next month will result in termination of his employment. LJ then explains to the employer for the first time that he has been late because of his psychiatric disability and that he needs to work on a later schedule. Under the ADA, may the employer discipline LJ?	
6. Your client has terminated Herman, an employee who had an explosive altercation with his supervisor during which he threatened the supervisor with physical harm. Your client terminated Herman immediately, in accordance with its policy of immediate termination of all employees who threaten supervisors. When Herman learned that his employment had been terminated, he asked your client to suspend the termination and to give him a month off for medical/psychiatric treatment instead. This is Herman's first request for any kind of accommodation and its also the first time the employer has learned about Herman's psychiatric disability. Is the employer required to rescind the discharge?	
7. Your client's employee has a psychiatric disability and is a productive employee so long as she takes her medication. When she does not take her medication, the employee engages in workplace misconduct. What are the employer's rights and obligations with regard to this employee?	

CASDA
July 16, 1998
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Heather D. Diddel, Esq.

EEOC	NOTICE	Number 915.002
		Date 3-25-97

1. SUBJECT: EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities

2. PURPOSE: This enforcement guidance sets forth the Commission's position on the application of Title I of the Americans with Disabilities Act of 1990 to individuals with psychiatric disabilities.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: ADA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 902 of Volume II of the Compliance Manual.

3-25-97 /S/

Date

Gilbert F. Casellas
Chairman

DISTRIBUTION: CM Holders

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EEOC Enforcement Guidance:
The Americans with Disabilities Act and Psychiatric Disabilities

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Enforcement Guidance: The Americans With Disabilities Act and Psychiatric Disabilities

INTRODUCTION

The workforce includes many individuals with psychiatric disabilities who face employment discrimination because their disabilities are stigmatized or misunderstood. Congress intended Title I of the Americans with Disabilities Act (ADA)[1] to combat such employment discrimination as well as the myths, fears, and stereotypes upon which it is based.[2]

The Equal Employment Opportunity Commission ("EEOC" or "Commission") receives a large number of charges under the ADA alleging employment discrimination based on psychiatric disability.[3] These charges raise a wide array of legal issues including, for example, whether an individual has a psychiatric disability as defined by the ADA and whether an employer may ask about an individual's psychiatric disability. People with psychiatric disabilities and employers also have posed numerous questions to the EEOC about this topic.

This guidance is designed to:

- facilitate the full enforcement of the ADA with respect to individuals alleging employment discrimination based on psychiatric disability;
- respond to questions and concerns expressed by individuals with psychiatric disabilities regarding the ADA; and

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[1] 42 U.S.C. §§ 12101-12117, 12201-12213 (1994) (codified as amended).

[2] H.R. Rep. No. 101-485, pt. 3, at 31-32 (1990) [hereinafter House Judiciary Report].

[3] Between July 26, 1992, and September 30, 1996, approximately 12.7% of ADA charges filed with EEOC were based on emotional or psychiatric impairment. These included charges based on anxiety disorders, depression, bipolar disorder (manic depression), schizophrenia, and other psychiatric impairments.

- answer questions posed by employers about how principles of ADA analysis apply in the context of psychiatric disabilities.[4]

WHAT IS A PSYCHIATRIC DISABILITY UNDER THE ADA?

Under the ADA, the term "disability" means: "(a) A physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment."[5]

This guidance focuses on the first prong of the ADA's definition of "disability" because of the great number of questions about how it is applied in the context of psychiatric conditions.

Impairment

1. What is a **"mental impairment"** under the ADA?

   The ADA rule defines "mental impairment" to include "[a]ny mental or psychological disorder, such as . . . emotional or mental illness."[6] Examples of "emotional or mental illness[es]" include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder,

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[4] The analysis in this guidance applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. § 791(g) (1994). It also applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C. §§ 793(d), 794(d) (1994).

[5] 42 U.S.C. § 12102(2) (1994); 29 C.F.R. § 1630.2(g) (1996). See generally EEOC Compliance Manual § 902, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7251 (1995).

[6] 29 C.F.R. § 1630.2(h)(2) (1996). This ADA regulatory definition also refers to mental retardation, organic brain syndrome, and specific learning disabilities. These additional mental conditions, as well as other neurological disorders such as Alzheimer's disease, are not the primary focus of this guidance.

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and post-traumatic stress disorder), schizophrenia, and personality disorders. The current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (now the fourth edition, DSM-IV) is relevant for identifying these disorders. The DSM-IV has been recognized as an important reference by courts[7] and is widely used by American mental health professionals for diagnostic and insurance reimbursement purposes.

Not all conditions listed in the DSM-IV, however, are disabilities, or even impairments, for purposes of the ADA. For example, the DSM-IV lists several conditions that Congress expressly excluded from the ADA's definition of "disability."[8] While DSM-IV covers conditions involving drug abuse, the ADA provides that the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of that use.[9] The DSM-IV also includes conditions that are not mental disorders but for which people may seek

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[7] See, e.g., Boldini v. Postmaster Gen., 928 F. Supp. 125, 130, 5 AD Cas. (BNA) 11, 14 (D.N.H. 1995) (stating, under section 501 of the Rehabilitation Act, that "in circumstances of mental impairment, a court may give weight to a diagnosis of mental impairment which is described in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association . . . .").

[8] These include various sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. 42 U.S.C. § 12211(b) (1994); 29 C.F.R. § 1630.3(d) (1996).

[9] 42 U.S.C. § 12210(a) (1994). However, individuals who are not currently engaging in the illegal use of drugs and who are participating in, or have successfully completed, a supervised drug rehabilitation program (or who have otherwise been successfully rehabilitated) may be covered by the ADA. Individuals who are erroneously regarded as engaging in the current illegal use of drugs, but who are not engaging in such use, also may be covered. Id. at § 12210(b).

Individuals with psychiatric disabilities may, either as part of their condition or separate from their condition, engage in the illegal use of drugs. In such cases, EEOC investigators may need to make a factual determination about whether an employer treated an individual adversely because of his/her psychiatric disability or because of his/her illegal use of drugs.

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treatment (for example, problems with a spouse or child).[10] Because these conditions are not disorders, they are not impairments under the ADA.[11]

Even if a condition is an impairment, it is not automatically a "disability." To rise to the level of a "disability," an impairment must "substantially limit" one or more major life activities of the individual.[12]

2. Are **traits or behaviors** in themselves mental impairments?

No. Traits or behaviors are not, in themselves, mental impairments. For example, **stress**, in itself, is not automatically a mental impairment. Stress, however, may be shown to be related to a mental or physical impairment. Similarly, traits like **irritability**, **chronic lateness, and poor judgment** are not, in themselves, mental impairments, although they may be linked to mental impairments.[13]

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[10] See DSM-IV chapter "Other Conditions That May Be a Focus of Clinical Attention."

[11] Individuals who do not have a mental impairment but are treated by their employers as having a substantially limiting impairment have a disability as defined by the ADA because they are regarded as having a substantially limiting impairment. See EEOC Compliance Manual § 902.8, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7282 (1995).

[12] This discussion refers to the terms "impairment" and "substantially limit" in the present tense. These references are not meant to imply that the determinations of whether a condition is an impairment, or of whether there is substantial limitation, are relevant only to whether an individual meets the first part of the definition of "disability," i.e., actually has a physical or mental impairment that substantially limits a major life activity. These determinations also are relevant to whether an individual has a record of a substantially limiting impairment or is regarded as having a substantially limiting impairment. See id. §§ 902.7, 902.8, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7276-78, 7281 (1995).

[13] Id. § 902.2(c)(4), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7258 (1995).

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Major Life Activities

An impairment must substantially limit one or more **major life activities** to rise to the level of a "disability" under the ADA.[14]

3. What **major life activities** are limited by mental impairments?

The major life activities limited by mental impairments **differ from person to person**. There is no exhaustive list of major life activities. For some people, mental impairments restrict major life activities such as learning, thinking, concentrating, interacting with others,[15] caring for oneself, speaking, performing manual tasks, or working. Sleeping is also a major life activity that may be limited by mental impairments.[16]

4. To establish a psychiatric disability, must an individual always show that s/he is substantially limited in **working**?

No. The first question is whether an individual is substantially limited in a major life activity **other than working** (e.g., sleeping, concentrating, caring for oneself). **Working** should be analyzed only if **no other major life activity** is substantially limited by an impairment.[17]

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[14] 42 U.S.C. § 12102(2)(A) (1994); 29 C.F.R. § 1630.2(g)(1) (1996). See also EEOC Compliance Manual § 902.3, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7261 (1995).

[15] Interacting with others, as a major life activity, is not substantially limited just because an individual is irritable or has some trouble getting along with a supervisor or coworker.

[16] Sleeping is not substantially limited just because an individual has some trouble getting to sleep or occasionally sleeps fitfully.

[17] See 29 C.F.R. pt. 1630 app. § 1630.2(j) (1996) ("[i]f an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered . . . . "); see also EEOC Compliance Manual § 902.4(c)(2), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7266 (1995).

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Substantial Limitation

Under the ADA, an impairment rises to the level of a disability if it substantially limits a major life activity.[18] "Substantial limitation" is evaluated in terms of the **severity** of the limitation and the **length of time** it restricts a major life activity.[19]

The determination that a particular individual has a substantially limiting impairment should be based on information about how the impairment affects that individual and not on generalizations about the condition. Relevant evidence for EEOC investigators includes descriptions of an individual's typical level of functioning at home, at work, and in other settings, as well as evidence showing that the individual's functional limitations are linked to his/her impairment. Expert testimony about substantial limitation is not necessarily required. Credible testimony from the individual with a disability and his/her family members, friends, or coworkers may suffice.

5. When is an impairment sufficiently **severe** to substantially limit a major life activity?

An impairment is sufficiently severe to substantially limit a major life activity if it **prevents** an individual from performing a major life activity or **significantly restricts the condition, manner, or duration** under which an individual can perform a major life activity, as compared to **the average person in the general population.**[20] An impairment **does not significantly restrict** major life activities if it results in only **mild limitations**.

6. Should the corrective effects of **medications** be considered when deciding if an impairment is so severe that it substantially limits a major life activity?

No. The ADA legislative history unequivocally states that the extent to which an impairment limits performance of a major life activity is assessed without

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[18] 42 U.S.C. § 12102(2) (1994).

[19] See generally EEOC Compliance Manual § 902.4, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7262 (1995).

[20] See 29 C.F.R. § 1630.2(j) (1996).

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regard to mitigating measures, including medications.[21] Thus, an individual who is taking medication for a mental impairment has an ADA disability if there is evidence that the mental impairment, when left untreated, substantially limits a major life activity.[22] Relevant evidence for EEOC investigators includes, for example, a description of how an individual's condition changed when s/he

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[21] S. Rep. No. 101-116, at 23 (1989); H.R. Rep. No. 101-485, pt. 2, at 52 (1990); House Judiciary Report, supra n.2, at 28-29. See also 29 C.F.R. pt. 1630 app. § 1630.2(j) (1996).

[22] ADA cases in which courts have disregarded the positive effects of medications or other treatment in the determination of disability include Canon v. Clark, 883 F. Supp. 718, 4 AD Cas. (BNA) 734 (S.D. Fla. 1995) (finding that individual with insulin-dependent diabetes stated an ADA claim), and Sarsycki v. United Parcel Ser., 862 F. Supp. 336, 340, 3 AD Cas. (BNA) 1039 (W.D. Okla. 1994) (stating that substantial limitation should be evaluated without regard to medication and finding that an individual with insulin-dependent diabetes had a disability under the ADA). Pertinent Rehabilitation Act cases in which courts have made similar determinations include Liff v. Secretary of Transp., 1994 WL 579912, at *3-*4 (D.D.C. 1994) (deciding under the Rehabilitation Act, after acknowledging pertinent ADA guidance, that depression controlled by medication is a disability), and Gilbert v. Frank, 949 F.2d 637, 641, 2 AD Cas. (BNA) 60 (2d Cir. 1991) (determining under the Rehabilitation Act that an individual who could not function without kidney dialysis had a substantially limiting impairment).

Cases in which courts have found that individuals are not substantially limited after considering the positive effects of medication are, in the Commission's view, incorrectly decided. See, e.g., Mackie v. Runyon, 804 F. Supp. 1508, 1510-11, 2 AD Cas. (BNA) 260 (M.D. Fla. 1992) (holding under section 501 of the Rehabilitation Act that bipolar disorder stabilized by medication is not substantially limiting); Chandler v. City of Dallas, 2 F.3d 1385, 1390-91, 2 AD Cas. (BNA) 1326 (5th Cir. 1993) (holding under section 504 of the Rehabilitation Act that an individual with insulin-dependent diabetes did not have a disability), cert. denied, 114 S. Ct. 1386, 3 AD Cas. (BNA) 512 (1994).

went off medication[23] or needed to have dosages adjusted, or a description of his/her condition before starting medication.[24]

7. How long does a mental impairment have to last to be substantially limiting?

An impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time. It is not substantially limiting if it lasts for only a brief time or does not significantly restrict an individual's ability to perform a major life activity.[25] Whether the impairment is substantially limiting is assessed without regard to mitigating measures such as medication.

> Example A: An employee has had major depression for almost a year. He has been intensely sad and socially withdrawn (except for going to work), has developed serious insomnia, and has had severe problems concentrating. This employee has an impairment (major depression) that significantly restricts his ability to interact with others, sleep, and concentrate. The effects of this impairment are severe and have lasted long enough to be substantially limiting.

In addition, some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities.[26]

> Example B: An employee has taken medication for bipolar disorder for a few months. For some time before starting medication, he experienced increasingly severe and frequent cycles of depression and mania; at times, he became extremely withdrawn socially or had difficulty caring

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[23] Some individuals do not experience renewed symptoms when they stop taking medication. These individuals are still covered by the ADA, however, if they have a record of a substantially limiting impairment (i.e., if their psychiatric impairment was sufficiently severe and long-lasting to be substantially limiting).

[24] If medications cause negative side effects, these side effects should be considered in assessing whether the individual is substantially limited. See, e.g., Guice-Mills v. Derwinski, 967 F.2d 794, 2 AD Cas. (BNA) 187 (2d Cir. 1992).

[25] EEOC Compliance Manual § 902.4(d), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7273 (1995).

[26] Id., 8 FEP Manual (BNA) 405:7271.

for himself. His symptoms have abated with medication, but his doctor says that the duration and course of his bipolar disorder is indefinite, although it is potentially long-term. This employee's impairment (bipolar disorder) significantly restricts his major life activities of interacting with others and caring for himself, when considered without medication. The effects of his impairment are severe, and their duration is indefinite and potentially long-term.

However, conditions that are temporary and have no permanent or long-term effects on an individual's major life activities are not substantially limiting.

> Example C: An employee was distressed by the end of a romantic relationship. Although he continued his daily routine, he sometimes became agitated at work. He was most distressed for about a month during and immediately after the breakup. He sought counseling and his mood improved within weeks. His counselor gave him a diagnosis of "adjustment disorder" and stated that he was not expected to experience any long-term problems associated with this event. While he has an impairment (adjustment disorder), his impairment was short-term, did not significantly restrict major life activities during that time, and was not expected to have permanent or long-term effects. This employee does not have a disability for purposes of the ADA.

8. Can **chronic, episodic disorders** be substantially limiting?

Yes. Chronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms. For some individuals, psychiatric impairments such as bipolar disorder, major depression, and schizophrenia may remit and intensify, sometimes repeatedly, over the course of several months or several years.[27]

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[27] See, e.g., Clark v. Virginia Bd. of Bar Exam'rs, 861 F. Supp. 512, 3 AD Cas. (BNA) 1066 (E.D. Va. 1994) (vacating its earlier ruling (at 3 AD Cas. (BNA) 780) that plaintiff's recurrent major depression did not constitute a "disability" under the ADA).

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9. When does an impairment substantially limit an individual's ability to **interact with others?**

An impairment substantially limits an individual's ability to interact with others if, due to the impairment, s/he is **significantly restricted as compared to the average person in the general population**. Some unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to establish a **substantial limitation** in interacting with others. An individual would be substantially limited, however, if his/ her relations with others were characterized **on a regular basis** by **severe** problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.

These limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.

Example: An individual diagnosed with schizophrenia now works successfully as a computer programmer for a large company. Before finding an effective medication, however, he stayed in his room at home for several months, usually refusing to talk to family and close friends. After finding an effective medication, he was able to return to school, graduate, and start his career. This individual has a mental impairment, schizophrenia, which substantially limits his ability to interact with others when evaluated without medication. Accordingly, he is an individual with a disability as defined by the ADA.

10. When does an impairment substantially limit an individual's ability to **concentrate**?

An impairment substantially limits an individual's ability to concentrate if, due to the impairment, s/he is **significantly restricted as compared to the average person in the general population.**[28] For example, an individual would be substantially limited if s/he was easily and frequently distracted, meaning that his/her attention was frequently drawn to irrelevant sights or sounds or to intrusive thoughts; or if s/he experienced his/her "mind going blank" on a frequent basis.

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[28] 29 C.F.R. § 1630.2(j)(ii) (1996); EEOC Compliance Manual § 902.3(b), Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7261 (1995).

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Such limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.[29]

Example A: An employee who has an anxiety disorder says that his mind wanders frequently and that he is often distracted by irrelevant thoughts. As a result, he makes repeated errors at work on detailed or complex tasks, even after being reprimanded. His doctor says that the errors are caused by his anxiety disorder and may last indefinitely. This individual has a disability because, as a result of an anxiety disorder, his ability to concentrate is significantly restricted as compared to the average person in the general population.

Example B: An employee states that he has trouble concentrating when he is tired or during long meetings. He attributes this to his chronic depression. Although his ability to concentrate may be slightly limited due to depression (a mental impairment), it is not significantly restricted as compared to the average person in the general population. Many people in the general population have difficulty concentrating when they are tired or during long meetings.

11. When does an impairment substantially limit an individual's ability to **sleep**?

An impairment substantially limits an individual's ability to sleep if, due to the impairment, his/her sleep is **significantly restricted as compared to the average person in the general population**. These limitations must be long-term or potentially long-term as opposed to temporary to justify a finding of ADA disability.

For example, an individual who sleeps only a negligible amount without medication for many months, due to post-traumatic stress disorder, would be significantly restricted as compared to the average person in the general population and therefore would be substantially limited in sleeping.[30] Similarly,

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[29] Substantial limitation in concentrating also may be associated with learning disabilities, neurological disorders, and physical trauma to the brain (e.g., stroke, brain tumor, or head injury in a car accident). Although this guidance does not focus on these particular impairments, the analysis of basic ADA issues is consistent regardless of the nature of the condition.

[30] A 1994 survey of 1,000 American adults reports that 71% averaged

(continued...)

an individual who for several months typically slept about two to three hours per night without medication, due to depression, also would be substantially limited in sleeping.

By contrast, an individual would not be substantially limited in sleeping if s/he had some trouble getting to sleep or sometimes slept fitfully because of a mental impairment. Although this individual may be slightly restricted in sleeping, s/he is not significantly restricted as compared to the average person in the general population.

12. When does an impairment substantially limit an individual's ability to **care for him/herself**?

An impairment substantially limits an individual's ability to care for him/herself if, due to the impairment, an individual is **significantly restricted as compared to the average person in the general population** in performing basic activities such as getting up in the morning, bathing, dressing, and preparing or obtaining food. These limitations must be long-term or potentially long-term as opposed to temporary to justify a finding of ADA disability.

Some psychiatric impairments, for example major depression, may result in an individual sleeping too much. In such cases, an individual may be substantially limited if, as a result of the impairment, s/he sleeps so much that s/he does not effectively care for him/herself. Alternatively, the individual may be substantially limited in working.

DISCLOSURE OF DISABILITY

Individuals with psychiatric disabilities may have questions about whether and when they must disclose their disability to their employer under the ADA. They may have concerns about the potential negative consequences of disclosing a psychiatric disability in the workplace, and about the confidentiality of information that they do disclose.

(...continued)
5-8 hours of sleep a night on weeknights and that 55% averaged 5-8 hours a night on weekends (with 37% getting more than 8 hours a night on weekends). See The Cutting Edge: Vital Statistics – America's Sleep Habits, Washington Post, May 24, 1994, Health Section at 5.

13. May an employer ask **questions on a job application** about history of treatment of mental illness, hospitalization, or the existence of mental or emotional illness or psychiatric disability?

No. An employer may not ask questions that are likely to elicit information about a disability before making an offer of employment.[31] Questions on a job application about psychiatric disability or mental or emotional illness or about treatment are likely to elicit information about a psychiatric disability and therefore are prohibited before an offer of employment is made.

14. **When** may an employer lawfully ask an individual about **a psychiatric disability** under the ADA?

An employer may ask for disability-related information, including information about psychiatric disability, only in the following limited circumstances:

- **Application Stage**. Employers are prohibited from asking disability-related questions before making an offer of employment. An exception, however, is if an applicant asks for **reasonable accommodation for the hiring process**. If the need for this accommodation is not obvious, an employer may ask an applicant for **reasonable** documentation about his/her disability. The employer may require the applicant to provide documentation from an appropriate professional concerning his/her disability and functional limitations.[32] A variety of health professionals may provide such documentation regarding psychiatric disabilities including primary health care professionals,[33] psychiatrists, psychologists,

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[31] See 42 U.S.C. § 12112(d)(2) (1994); 29 C.F.R. § 1630.13(a) (1996). See also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 4, 8 FEP Manual (BNA) 405:7192 (1995).

[32] Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7193 (1995).

[33] When a primary health care professional supplies documentation about a psychiatric disability, his/her credibility depends on how well s/he knows the individual and on his/her knowledge about the psychiatric disability.

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psychiatric nurses, and licensed mental health professionals such as licensed clinical social workers and licensed professional counselors.[34]

An employer should make clear to the applicant why it is requesting such information, i.e., to verify the existence of a disability and the need for an accommodation. Furthermore, the employer may request only information necessary to accomplish these limited purposes.

> Example A: An applicant for a secretarial job asks to take a typing test in a quiet location rather than in a busy reception area "because of a medical condition." The employer may make disability-related inquiries at this point because the applicant's need for reasonable accommodation under the ADA is not obvious based on the statement that an accommodation is needed "because of a medical condition." Specifically, the employer may ask the applicant to provide documentation showing that she has an impairment that substantially limits a major life activity and that she needs to take the typing test in a quiet location because of disability-related functional limitations.[35]

Although an employer may not ask an applicant if s/he will need reasonable accommodation **for the job**, there is an exception if the employer could **reasonably believe**, before making a job offer, that the applicant will need accommodation to perform the functions of the job. For an individual with a non-visible disability, this may occur if the individual voluntarily discloses his/her disability or if s/he voluntarily tells the employer that s/he needs reasonable accommodation to perform the job. The employer may then ask certain limited questions, specifically:

- whether the applicant needs reasonable accommodation; and

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[34] Important information about an applicant's functional limitations also may be obtained from non-professionals, such as the applicant, his/her family members, and friends.

[35] In response to the employer's request for documentation, the applicant may elect to revoke the request for accommodation and to take the test in the reception area. In these circumstances, where the request for reasonable accommodation has been withdrawn, the employer cannot continue to insist on obtaining the documentation.

- what type of reasonable accommodation would be needed to perform the functions of the job.[36]

- **After making an offer of employment, if the employer requires a post-offer, preemployment medical examination or inquiry.** After an employer extends an offer of employment, the employer **may** require a medical examination (including a psychiatric examination) or ask questions related to disability (including questions about psychiatric disability) if the employer subjects all entering employees in the same job category to the same inquiries or examinations regardless of disability. The inquiries and examinations do not need to be related to the job.[37]

- **During employment, when a disability-related inquiry or medical examination of an employee is "job-related and consistent with business necessity."**[38] This requirement may be met when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions[39] will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. Thus, for example, inquiries or medical examinations are permitted if they follow-up on a request for reasonable accommodation when the need for accommodation is not obvious, or if they address reasonable concerns about whether an individual is fit to perform essential functions of his/her position. In addition, inquiries or

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[36] EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6-7, 8 FEP Manual (BNA) 405:7193-94 (1995).

[37] If an employer uses the results of these inquiries or examinations to screen out an individual because of disability, the employer must prove that the exclusionary criteria are job-related and consistent with business necessity, and cannot be met with reasonable accommodation, in order to defend against a charge of employment discrimination. 42 U.S.C. § 12112(b)(6) (1994); 29 C.F.R. §§ 1630.10, 1630.14(b)(3), 1630.15(b) (1996).

[38] 42 U.S.C. § 12112(d)(4) (1994); 29 C.F.R. § 1630.14(c) (1996).

[39] A "qualified" individual with a disability is one who can perform the essential functions of a position with or without reasonable accommodation. 42 U.S.C. § 12111(8) (1994). An employer does not have to lower production standards, whether qualitative or quantitative, to enable an individual with a disability to perform an essential function. See 29 C.F.R. pt. 1630 app. § 1630.2(n) (1996).

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examinations are permitted if they are required by another Federal law or regulation.[40] In these situations, the inquiries or examinations **must not exceed the scope of the specific medical condition and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.**[41]

> Example B: A delivery person does not learn the route he is required to take when he makes deliveries in a particular neighborhood. He often does not deliver items at all or delivers them to the wrong address. He is not adequately performing his essential function of making deliveries. There is no indication, however, that his failure to learn his route is related in any way to a medical condition. Because the employer does not have a reasonable belief, **based on objective evidence**, that this individual's ability to perform his essential job function is impaired by a medical condition, a medical examination (including a psychiatric examination) or disability-related inquiries would not be job-related and consistent with business necessity.[42]
>
> Example C: A limousine service knows that one of its best drivers has bipolar disorder and had a manic episode last year, which started when he was driving a group of diplomats to around-the-clock meetings. During the manic episode, the chauffeur engaged in behavior that posed a direct threat to himself and others (he repeatedly drove a company limousine in a reckless manner). After a short leave of absence, he returned to work and to his usual high level of performance. The limousine service now wants to assign him to drive several business executives who may begin

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[40] 29 C.F.R. § 1630.15(e) (1996) ("It may be a defense to a charge of discrimination . . . that a challenged action is required or necessitated by another Federal law or regulation . . . .").

[41] There may be additional situations which could meet the "job-related and consistent with business necessity" standard. For example, periodic medical examinations for public safety positions that are narrowly tailored to address specific job-related concerns and are shown to be consistent with business necessity would be permissible.

[42] Of course, an employer would be justified in taking disciplinary action in these circumstances.

around-the-clock labor negotiations during the next several weeks. The employer is concerned, however, that this will trigger another manic episode and that, as a result, the employee will drive recklessly and pose a significant risk of substantial harm to himself and others. There is no indication that the employee's condition has changed in the last year, or that his manic episode last year was not precipitated by the assignment to drive to around-the-clock meetings. The employer may make disability-related inquiries, or require a medical examination, because it has a reasonable belief, based on objective evidence, that the employee will pose a direct threat to himself or others due to a medical condition.

Example D: An employee with depression seeks to return to work after a leave of absence during which she was hospitalized and her medication was adjusted. Her employer may request a fitness-for-duty examination because it has a reasonable belief, based on the employee's hospitalization and medication adjustment, that her ability to perform essential job functions may continue to be impaired by a medical condition. This examination, however, must be limited to the effect of her depression on her ability, with or without reasonable accommodation, to perform essential job functions. Inquiries about her entire psychiatric history or about the details of her therapy sessions would, for example, exceed this limited scope.

15. Do ADA **confidentiality requirements** apply to information about a psychiatric disability disclosed to an employer?

Yes. Employers must keep all information concerning the medical condition or history of its applicants or employees, including information about psychiatric disability, confidential under the ADA. This includes medical information that an individual voluntarily tells his/her employer. Employers must collect and maintain such information on separate forms and in separate medical files, apart from the usual personnel files.[43] There are limited exceptions to the ADA confidentiality requirements:

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[43] For a discussion of other confidentiality issues, see EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 21-23, 8 FEP Manual (BNA) 405:7201-02 (1995).

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- supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;
- first aid and safety personnel may be told if the disability might require emergency treatment; and
- government officials investigating compliance with the ADA must be given relevant information on request.[44]

16. How can an employer respond **when employees ask questions about a coworker who has a disability**?

If employees ask questions about a coworker who has a disability, the employer must not disclose any medical information in response. Apart from the limited exceptions listed in Question 15, the ADA confidentiality provisions prohibit such disclosure.

An employer also may not tell employees whether it is providing a reasonable accommodation for a particular individual. A statement that an individual receives a reasonable accommodation discloses that the individual probably has a disability because only individuals with disabilities are entitled to reasonable accommodation under the ADA. In response to coworker questions, however, the employer may explain that it is acting for legitimate business reasons or in compliance with federal law.

As background information for all employees, an employer may find it helpful to explain the requirements of the ADA, including the obligation to provide reasonable accommodation, in its employee handbook or in its employee orientation or training.

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[44] 42 U.S.C. § 12112(d)(3)(B), (4)(C) (1994); 29 C.F.R. § 1630.14(b)(1) (1996). The Commission has interpreted the ADA to allow employers to disclose medical information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws. 29 C.F.R. pt. 1630 app. § 1630.14(b) (1996). The Commission also has interpreted the ADA to permit employers to use medical information for insurance purposes. Id. See also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 21 nn.24, 25, 8 FEP Manual (BNA) 405:7201 nn.24, 25 (1995).

REQUESTING REASONABLE ACCOMMODATION

An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability unless it can show that the accommodation would impose an undue hardship.[45] An employee's decision about requesting reasonable accommodation may be influenced by his/her concerns about the potential negative consequences of disclosing a psychiatric disability at work. Employees and employers alike have posed numerous questions about what constitutes a request for reasonable accommodation.

17. When an individual decides to **request reasonable accommodation**, what must s/he say to make the request and start the reasonable accommodation process?

When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."[46]

Example A: An employee asks for time off because he is "depressed and stressed." The employee has communicated a request for a change at work (time off) for a reason related to a medical condition (being "depressed and stressed" may be "plain English" for a medical condition). This statement is sufficient to put the employer on notice that the employee is requesting reasonable accommodation. However, if the employee's need for accommodation is not obvious, the employer may ask for **reasonable** documentation concerning the employee's disability and functional limitations.[47]

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[45] See 42 U.S.C. §§ 12111(9), 12112(b)(5)(A) (1994); 29 C.F.R. § 1630.2(o), .9 (1996); 29 C.F.R. pt. 1630 app. § 1630.9 (1996).

[46] Schmidt v. Safeway, Inc., 864 F. Supp. 991, 3 AD Cas. (BNA) 1141 (D. Or. 1994) (an employee's request for reasonable accommodation need not use "magic words" and can be in plain English). See Bultemeyer v. Ft. Wayne Community Schs., 6 AD Cas. (BNA) 67 (7th Cir. 1996) (an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist).

[47] See Question 21 infra about employers requesting documentation after (continued...)

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Example B: An employee submits a note from a health professional stating that he is having a stress reaction and needs one week off. Subsequently, his wife telephones the Human Resources department to say that the employee is disoriented and mentally falling apart and that the family is having him hospitalized. The wife asks about procedures for extending the employee's leave and states that she will provide the necessary information as soon as possible but that she may need a little extra time. The wife's statement is sufficient to constitute a request for reasonable accommodation. The wife has asked for changes at work (an exception to the procedures for requesting leave and more time off) for a reason related to a medical condition (her husband had a stress reaction and is so mentally disoriented that he is being hospitalized). As in the previous example, if the need for accommodation is not obvious, the employer may request documentation of disability and clarification of the need for accommodation.[48]

Example C: An employee asks to take a few days off to rest after the completion of a major project. The employee does not link her need for a few days off to a medical condition. Thus, even though she has requested a change at work (time off), her statement is not sufficient to put the employer on notice that she is requesting reasonable accommodation.

18. May someone **other than the employee request a reasonable accommodation** on behalf of an individual with a disability?

Yes, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a

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(...continued)
receiving a request for reasonable accommodation.

[48] In the Commission's view, Miller v. Nat'l Cas. Co., 61 F.3d 627, 4 AD Cas. (BNA) 1089 (8th Cir. 1995) was incorrectly decided. The court in Miller held that the employer was not alerted to Miller's disability and need for accommodation despite the fact that Miller's sister phoned the employer repeatedly and informed it that Miller was falling apart mentally and that the family was trying to get her into a hospital. See also Taylor v. Principal Financial Group, 5 AD Cas. (BNA) 1653 (5th Cir. 1996).

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disability.[49] Of course, an employee may refuse to accept an accommodation that is not needed.

19. Do requests for reasonable accommodation need to be **in writing**?

No. Requests for reasonable accommodation do not need to be in writing. Employees may request accommodations in conversation or may use any other mode of communication.[50]

20. **When** should an individual with a disability **request a reasonable accommodation** to do the job?

An individual with a disability is not required to request a reasonable accommodation at the beginning of employment. S/he may request a reasonable accommodation at any time during employment.[51]

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[49] Cf. Beck v. Univ. of Wis., 75 F.3d 1130, 5 AD Cas. (BNA) 304 (7th Cir. 1996) (assuming, without discussion, that a doctor's note requesting reasonable accommodation on behalf of his patient triggered the reasonable accommodation process); Schmidt v. Safeway, Inc., 864 F. Supp. 991, 3 AD Cas. (BNA) 1141 (D. Or. 1994) (stating that a doctor need not be expressly authorized to request accommodation on behalf of an employee in order to make a valid request).

In addition, because the reasonable accommodation process presumes open communication between the employer and the employee with the disability, the employer should be receptive to any relevant information or requests it receives from a third party acting on the employee's behalf. 29 C.F.R. pt. 1630 app. § 1630.9 (1996).

[50] Although individuals with disabilities are not required to keep records, they may find it useful to document requests for reasonable accommodation in the event there is a dispute about whether or when they requested accommodation. Of course, employers must keep all employment records, including records of requests for reasonable accommodation, for one year from the making of the record or the personnel action involved, whichever occurs later. 29 C.F.R. § 1602.14 (1996).

[51] As a practical matter, it may be in the employee's interest to request a

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21. May an employer ask an employee for **documentation** when the employee requests reasonable accommodation for the job?

Yes. When the **need for accommodation is not obvious**, an employer may ask an employee for **reasonable** documentation about his/her disability and functional limitations. The employer is entitled to know that the employee has a covered disability for which s/he needs a reasonable accommodation.[52] A variety of health professionals may provide such documentation with regard to psychiatric disabilities.[53]

Example A: An employee asks for time off because he is "depressed and stressed." Although this statement is sufficient to put the employer on notice that he is requesting accommodation,[54] the employee's need for accommodation is not obvious based on this statement alone. Accordingly, the employer may require **reasonable** documentation that the employee has a disability within the meaning of the ADA and, if he has such a disability, that the functional limitations of the disability necessitate time off.

Example B: Same as Example A, except that the employer requires the employee to submit **all** of the records from his health professional regarding his mental health history, including materials that are not relevant to disability and reasonable accommodation under the ADA. This is not a request for **reasonable** documentation. All of these records are not required to determine if the employee has a disability as defined by the ADA and needs the requested reasonable accommodation because of his disability-related functional limitations. As one alternative, in order to determine the scope of its ADA obligations, the employer may ask the

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[51](...continued)
reasonable accommodation **before** performance suffers or conduct problems occur.

[52] EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7193 (1995).

[53] See supra nn.32-34 and accompanying text. See also Bultemeyer v. Ft. Wayne Community Schs., 6 AD Cas. (BNA) 67 (7th Cir. 1996) (stating that, if employer found the precise meaning of employee's request for reasonable accommodation unclear, employer should have spoken to the employee or his psychiatrist, thus properly engaging in the interactive process).

[54] See Question 17, Example A, supra.

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employee to sign a limited release allowing the employer to submit a list of specific questions to the employee's health care professional about his condition and need for reasonable accommodation.

22. May an employer require an employee to go to a health care professional of the **employer's (rather than the employee's) choice** for purposes of documenting need for accommodation and disability?

The ADA does not prevent an employer from requiring an employee to go to an appropriate health professional of the employer's choice if the employee initially provides insufficient information to substantiate that s/he has an ADA disability and needs a reasonable accommodation. Of course, any examination must be job-related and consistent with business necessity.[55] If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).

SELECTED TYPES OF REASONABLE ACCOMMODATION

Reasonable accommodations for individuals with disabilities must be determined on a case-by-case basis because workplaces and jobs vary; as do people with disabilities. Accommodations for individuals with psychiatric disabilities may involve changes to workplace policies, procedures, or practices. Physical changes to the workplace or extra equipment also may be effective reasonable accommodations for some people.

In some instances, the precise nature of an effective accommodation for an individual may not be immediately apparent. Mental health professionals, including psychiatric rehabilitation counselors, may be able to make suggestions about particular accommodations and, of equal importance, help employers and employees communicate effectively about reasonable accommodation.[56] The questions below

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[55] Employers also may consider alternatives like having their health professional consult with the employee's health professional, with the employee's consent.

[56] The Job Accommodation Network (JAN) also provides advice free-of-charge to employers and employees contemplating reasonable accommodation. JAN is a service of the President's Committee on Employment of People with Disabilities which, in turn, is funded by the U.S. Department of Labor. JAN can be

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discuss selected types of reasonable accommodation that may be effective for certain individuals with psychiatric disabilities.[57]

23. Does reasonable accommodation include giving an individual with a disability **time off** from work or a **modified work schedule**?

Yes. Permitting the use of accrued paid leave or providing additional unpaid leave for treatment or recovery related to a disability is a reasonable accommodation, unless (or until) the employee's absence imposes an undue hardship on the operation of the employer's business.[58] This includes leaves of absence, occasional leave (e.g., a few hours at a time), and part-time scheduling.

A related reasonable accommodation is to allow an individual with a disability to change his/her regularly scheduled working hours, for example, to work 10 AM to 6 PM rather than 9 AM to 5 PM, barring undue hardship. Some medications taken for psychiatric disabilities cause extreme grogginess and lack

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reached at 1-800-ADA-WORK.

[57] Some of the accommodations discussed in this section also may prove effective for individuals with traumatic brain injuries, stroke, and other mental disabilities. As a general matter, a covered employer must provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, barring undue hardship. 42 U.S.C. § 12112(b)(5)(A) (1994).

[58] 29 C.F.R. pt. 1630 app. § 1630.2(o) (1996). Courts have recognized leave as a reasonable accommodation. See, e.g., Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 3 AD Cas. (BNA) 1636 (7th Cir. 1995) (defendant had duty to accommodate plaintiff's pressure ulcers resulting from her paralysis which required her to stay home for several weeks); Vializ v. New York City Bd. of Educ., 1995 WL 110112, 4 AD Cas. (BNA) 345 (S.D.N.Y. 1995) (plaintiff stated claim under ADA where she alleged that she would be able to return to work after back injury if defendant granted her a temporary leave of absence); Schmidt v. Safeway, Inc., 864 F. Supp. 991, 3 AD Cas. (BNA) 1141 (D. Or. 1994) ("[A] leave of absence to obtain medical treatment is a reasonable accommodation if it is likely that, following treatment, [the employee] would have been able to safely perform his duties . . . .").

of concentration in the morning. Depending on the job, a later schedule can enable the employee to perform essential job functions.

24. What types of **physical changes to the workplace** or **equipment** can serve as accommodations for people with psychiatric disabilities?

Simple physical changes to the workplace may be effective accommodations for some individuals with psychiatric disabilities. For example, room dividers, partitions, or other soundproofing or visual barriers between workspaces may accommodate individuals who have disability-related limitations in concentration. Moving an individual away from noisy machinery or reducing other workplace noise that can be adjusted (e.g., lowering the volume or pitch of telephones) are similar reasonable accommodations. Permitting an individual to wear headphones to block out noisy distractions also may be effective.

Some individuals who have disability-related limitations in concentration may benefit from access to equipment like a tape recorder for reviewing events such as training sessions or meetings.

25. Is it a reasonable accommodation to **modify a workplace policy**?

Yes. It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, barring undue hardship.[59] For example, it would be a reasonable accommodation to allow an individual with a disability, who has difficulty concentrating due to the disability, to take detailed notes during client presentations even though company policy discourages employees from taking extensive notes during such sessions.

> Example: A retail employer does not allow individuals working as cashiers to drink beverages at checkout stations. The retailer also limits cashiers to two 15-minute breaks during an eight-hour shift, in addition to a meal break. An individual with a psychiatric disability needs to drink beverages approximately once an hour in order to combat dry mouth, a side-effect of his psychiatric medication. This individual requests reasonable accommodation. In this example, the employer should consider either modifying its policy against drinking beverages at checkout stations or modifying its policy limiting cashiers to two 15-minute breaks each day plus a meal break, barring undue hardship.

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[59] 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1996).

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Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies. As an example, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability-related medical problems, barring undue hardship.[60] In addition, an employer, in spite of a "no-leave" policy, may, in appropriate circumstances, be required to provide leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship.[61]

26. Is adjusting **supervisory methods** a form of reasonable accommodation?

Yes. Supervisors play a central role in achieving effective reasonable accommodations for their employees. In some circumstances, supervisors may be able to adjust their methods as a reasonable accommodation by, for example, communicating assignments, instructions, or training by the medium that is most effective for a particular individual (e.g., in writing, in conversation, or by electronic mail). Supervisors also may provide or arrange additional training or modified training materials.

Adjusting the level of supervision or structure sometimes may enable an otherwise qualified individual with a disability to perform essential job functions. For example, an otherwise qualified individual with a disability who experiences limitations in concentration may request more detailed day-to-day guidance, feedback, or structure in order to perform his job.[62]

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[60] See Dutton v. Johnson County Bd., 1995 WL 337588, 3 AD Cas. (BNA) 1614 (D. Kan. 1995) (it was a reasonable accommodation to permit an individual with a disability to use unscheduled vacation time to cover absence for migraine headaches, where that did not pose an undue hardship and employer knew about the migraine headaches and the need for accommodation).

[61] See 29 C.F.R. pt. 1630 app. § 1630.15(b), (c) (1996).

[62] Reasonable accommodation, however, does not require lowering standards or removing essential functions of the job. Bolstein v. Reich, 1995 WL 46387, 3 AD Cas. (BNA) 1761 (D.D.C. 1995) (attorney with chronic depression and severe personality disturbance was not a qualified individual with a disability because his requested accommodations of more supervision, less complex

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Example: An employee requests more daily guidance and feedback as a reasonable accommodation for limitations associated with a psychiatric disability. In response to his request, the employer consults with the employee, his health care professional, and his supervisor about how his limitations are manifested in the office (the employee is unable to stay focused on the steps necessary to complete large projects) and how to make effective and practical changes to provide the structure he needs. As a result of these consultations, the supervisor and employee work out a long-term plan to initiate weekly meetings to review the status of large projects and identify which steps need to be taken next.

27. Is it a reasonable accommodation to provide a **job coach**?

Yes. An employer may be required to provide a temporary job coach to assist in the training of a qualified individual with a disability as a reasonable accommodation, barring undue hardship.[63] An employer also may be required to allow a job coach paid by a public or private social service agency to accompany the employee at the job site as a reasonable accommodation.

28. Is it a reasonable accommodation to make sure that an individual takes **medication** as prescribed?

No. Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a

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assignments, and the exclusion of appellate work would free him of the very duties that justified his GS-14 grade), motion for summary affirmance granted, 1995 WL 686236 (D.C. Cir. 1995). The court in Bolstein noted that the plaintiff objected to a reassignment to a lower grade in which he could have performed the essential functions of the position. 1995 WL 46387, * 4, 3 AD Cas. (BNA) 1761, 1764 (D.D.C. 1995).

[63] See 29 C.F.R. pt. 1630 app. § 1630.9 (1996) (discussing supported employment); U.S. Equal Employment Opportunity Commission, "A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act," at 3.4, 8 FEP Manual (BNA) 405:7001 (1992) [hereinafter Technical Assistance Manual]. A job coach is a professional who assists individuals with severe disabilities with job placement and job training.

barrier that is unique to the workplace. When people do not take medication as prescribed, it affects them on and off the job.

29. When is **reassignment** to a different position required as a reasonable accommodation?

In general, reassignment **must** be considered as a reasonable accommodation when accommodation in the present job would cause undue hardship[64] or would not be possible.[65] Reassignment **may** be considered if there are circumstances under which **both** the employer and employee **voluntarily agree** that it is preferable to accommodation in the present position.[66]

Reassignment should be made to an equivalent position that is vacant or will become vacant within a reasonable amount of time. If an equivalent position is not available, the employer must look for a vacant position at a lower level for which the employee is qualified. Reassignment is not required if a vacant position at a lower level is also unavailable.

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[64] For example, it may be an undue hardship to provide extra supervision as a reasonable accommodation in the present job if the employee's current supervisor is already very busy supervising several other individuals and providing direct service to the public.

[65] 42 U.S.C. § 12111(9)(B) (1994). For example, it may not be possible to accommodate an employee in his present position if he works as a salesperson on the busy first floor of a major department store and needs a reduction in visual distractions and ambient noise as a reasonable accommodation.

See EEOC Enforcement Guidance: Workers' Compensation and the ADA at 17, 8 FEP Manual (BNA) 405:7399-7400 (1996) (where an employee can no longer perform the essential functions of his/her original position, with or without a reasonable accommodation, because of a disability, an employer must reassign him/her to an equivalent vacant position for which s/he is qualified, absent undue hardship).

[66] Technical Assistance Manual, supra note 63, at 3.10(5), 8 FEP Manual (BNA) 405:7011-12 (reassignment to a vacant position as a reasonable accommodation); see also 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1996).

CONDUCT

Maintaining satisfactory conduct and performance typically is not a problem for individuals with psychiatric disabilities. Nonetheless, circumstances arise when employers need to discipline individuals with such disabilities for misconduct.

30. May an employer **discipline** an individual with a disability for **violating a workplace conduct standard** if the misconduct **resulted from a disability**?

Yes, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity.[67] For example, nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.[68] Other conduct standards, however, may not be job-related for the position in question and consistent with business necessity. If they are not, imposing discipline under them could violate the ADA.

Example A: An employee steals money from his employer. Even if he asserts that his misconduct was caused by a disability, the employer may discipline him consistent with its uniform disciplinary policies because the individual violated a conduct standard – a prohibition against employee theft – that is job-related for the position in question and consistent with business necessity.

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[67] 42 U.S.C. § 12112(b)(6) (1994); 29 C.F.R. § 1630.10, .15(c) (1996).

[68] See EEOC Compliance Manual § 902.2, n.11, Definition of the Term "Disability," 8 FEP Manual (BNA) 405:7259, n.11 (1995) (an employer "does not have to excuse . . . misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees"); see 56 Fed. Reg. 35,733 (1991) (referring to revisions to proposed ADA rule that "clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards").

Example B: An employee at a clinic tampers with and incapacitates medical equipment. Even if the employee explains that she did this because of her disability, the employer may discipline her consistent with its uniform disciplinary policies because she violated a conduct standard -- a rule prohibiting intentional damage to equipment -- that is job-related for the position in question and consistent with business necessity. However, if the employer disciplines her even though it has not disciplined people without disabilities for the same misconduct, the employer would be treating her differently because of disability in violation of the ADA.

Example C: An employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social. Coworkers have complained that when they try to engage him in casual conversation, he walks away or gives a curt reply. When he has to talk to a coworker, he is abrupt and rude. His work, however, has not suffered. The employer's company handbook states that employees should have a neat appearance at all times. The handbook also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of coworkers, the employee explains that his appearance and demeanor have deteriorated because of his disability which was exacerbated during this time period.

The dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules to this employee would violate the ADA.

31. Must an employer make reasonable accommodation for an individual with a disability who violated a conduct rule that is job-related for the position in question and consistent with business necessity?

An employer must make reasonable accommodation to enable **an otherwise qualified individual with a disability** to meet such a conduct standard **in the**

future, barring undue hardship.[69] Because reasonable accommodation is always prospective, however, an employer is not required to excuse past misconduct.[70]

Example A: A reference librarian frequently loses her temper at work, disrupting the library atmosphere by shouting at patrons and coworkers. After receiving a suspension as the second step in uniform, progressive discipline, she discloses her disability, states that it causes her behavior, and requests a leave of absence for treatment. The employer may discipline her because she violated a conduct standard -- a rule prohibiting disruptive behavior towards patrons and coworkers -- that is job-related for the position in question and consistent with business necessity. The employer, however, must grant her request for a leave of absence as a reasonable accommodation, barring undue hardship, to enable her to meet this conduct standard in the future.

Example B: An employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning. His scheduled hours are 9:00 AM to 5:30 PM, but he arrives at 9:00, 9:30, 10:00 or even 10:30 on any given day. His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule. In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity. The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10:00 AM to 6:30 PM, a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 AM.

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[69] See 29 C.F.R. § 1630.15(d) (1996).

[70] Therefore, it may be in the employee's interest to request a reasonable accommodation **before** performance suffers or conduct problems occur. See Question 20 supra.

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Example C: An employee has a hostile altercation with his supervisor and threatens the supervisor with physical harm. The employer immediately terminates the individual's employment, consistent with its policy of immediately terminating the employment of anyone who threatens a supervisor. When he learns that his employment has been terminated, the employee asks the employer to put the termination on hold and to give him a month off for treatment instead. This is the employee's first request for accommodation and also the first time the employer learns about the employee's disability. The employer is not required to rescind the discharge under these circumstances, because the employee violated a conduct standard – a rule prohibiting threats of physical harm against supervisors – that is job-related for the position in question and consistent with business necessity. The employer also is not required to offer reasonable accommodation for the future because this individual is no longer a qualified individual with a disability. His employment was terminated under a uniformly applied conduct standard that is job-related for the position in question and consistent with business necessity.[71]

32. How should an employer deal with an employee with a disability who is engaging in misconduct because s/he is **not taking his/her medication**?

The employer should focus on the employee's conduct and explain to the employee the consequences of continued misconduct in terms of uniform disciplinary procedures. It is the **employee's** responsibility to decide about medication and to consider the consequences of not taking medication.[72]

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[71] Regardless of misconduct, an individual with a disability must be allowed to file a grievance or appeal challenging his/her termination when that is a right normally available to other employees.

[72] If the employee requests reasonable accommodation in order to address the misconduct, the employer must grant the request, subject to undue hardship.

DIRECT THREAT

Under the ADA, an employer may lawfully exclude an individual from employment for safety reasons only if the employer can show that employment of the individual would pose a "direct threat."[73] Employers must apply the "direct threat" standard uniformly and may not use safety concerns to justify exclusion of persons with disabilities when persons without disabilities would not be excluded in similar circumstances.[74]

The EEOC's ADA regulations explain that "direct threat" means "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[75] A "significant" risk is a high, and not just a slightly increased, risk.[76] The determination that an individual poses a "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence.[77] With respect to the employment of individuals with psychiatric disabilities, the employer must identify the specific behavior that would pose a direct threat.[78] An individual does not pose a "direct threat" simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability.[79]

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[73] See 42 U.S.C. § 12113(b) (1994).

[74] 29 C.F.R. pt. 1630 app. § 1630.2(r) (1996).

[75] 29 C.F.R. § 1630.2(r) (1996). To determine whether an individual would pose a direct threat, the factors to be considered include: (1) duration of the risk; (2) nature and severity of the potential harm; (3) likelihood that the potential harm will occur; and (4) imminence of the potential harm. Id.

[76] 29 C.F.R. pt. 1630 app. § 1630.2(r) (1996).

[77] 29 C.F.R. § 1630.2(r) (1996).

[78] 29 C.F.R. pt. 1630 app. § 1630.2(r) (1996).

[79] House Judiciary Report, supra n.2, at 45.

33. Does an individual pose a direct threat in operating machinery solely because s/he takes **medication** that may as a side effect diminish concentration and/or coordination for some people?

No. An individual does not pose a direct threat solely because s/he takes a medication that may diminish coordination or concentration for some people as a side effect. Whether such an individual poses a direct threat must be determined on a case-by-case basis, based on a reasonable medical judgment relying on the most current medical knowledge and/or on the best available objective evidence. Therefore, an employer must determine the nature and severity of this individual's side effects, how those side effects influence his/her ability to safely operate the machinery, and whether s/he has had safety problems in the past when operating the same or similar machinery while taking the medication. If a significant risk of substantial harm exists, then an employer must determine if there is a reasonable accommodation that will reduce or eliminate the risk.

Example: An individual receives an offer for a job in which she will operate an electric saw, conditioned on a post-offer medical examination. In response to questions at this medical examination, the individual discloses her psychiatric disability and states that she takes a medication to control it. This medication is known to sometimes affect coordination and concentration. The company doctor determines that the individual experiences negligible side effects from the medication because she takes a relatively low dosage. She also had an excellent safety record at a previous job, where she operated similar machinery while taking the same medication. This individual does not pose a direct threat.

34. When can an employer refuse to hire someone based on his/her **history of violence or threats of violence**?

An employer may refuse to hire someone based on his/her history of violence or threats of violence if it can show that the individual poses a direct threat. A determination of "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job, considering the most current medical knowledge and/or the best available objective evidence. To find that an individual with a psychiatric disability poses a direct threat, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. This includes an assessment of the likelihood and imminence of future violence.

Example: An individual applies for a position with Employer X. When Employer X checks his employment background, she learns that he was terminated two weeks ago by Employer Y, after he told a coworker that he would get a gun and "get his supervisor if he tries anything again." Employer X also learns that these statements followed three months of escalating incidents in which this individual had had several altercations in the workplace, including one in which he had to be restrained from fighting with a coworker. He then revealed his disability to Employer Y. After being given time off for medical treatment, he continued to have trouble controlling his temper and was seen punching the wall outside his supervisor's office. Finally, he made the threat against the supervisor and was terminated. Employer X learns that, since then, he has not received any further medical treatment. Employer X does not hire him, stating that this history indicates that he poses a direct threat.

This individual poses a direct threat as a result of his disability because his recent overt acts and statements (including an attempted fight with a coworker, punching the wall, and making a threatening statement about the supervisor) support the conclusion that he poses a "significant risk of substantial harm." Furthermore, his prior treatment had no effect on his behavior, he had received no subsequent treatment, and only two weeks had elapsed since his termination, all supporting a finding of direct threat.

35. Does an individual who has attempted **suicide** pose a direct threat when s/he seeks to return to work?

No, in most circumstances. As with other questions of direct threat, an employer must base its determination on an individualized assessment of the person's ability to safely perform job functions when s/he returns to work. Attempting suicide does not mean that an individual poses an imminent risk of harm to him/herself when s/he returns to work. In analyzing direct threat (including the likelihood and imminence of any potential harm), the employer must seek reasonable medical judgments relying on the most current medical knowledge and/or the best available factual evidence concerning the employee.

Example: An employee with a known psychiatric disability was hospitalized for two suicide attempts, which occurred within several weeks of each other. When the employee asked to return to work, the employer allowed him to return pending an evaluation of medical reports to determine his ability to safely perform his job. The individual's therapist and psychiatrist both submitted documentation stating that he

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could safely perform all of his job functions. Moreover, the employee performed his job safely after his return, without reasonable accommodation. The employer, however, terminated the individual's employment after evaluating the doctor's and therapist's reports, without citing any contradictory medical or factual evidence concerning the employee's recovery. Without more evidence, this employer cannot support its determination that this individual poses a direct threat.[80]

PROFESSIONAL LICENSING

Individuals may have difficulty obtaining state-issued professional licenses if they have, or have a record of, a psychiatric disability. When a psychiatric disability results in denial or delay of a professional license, people may lose employment opportunities.

36. Would an individual have grounds for filing an ADA charge if an employer refused to hire him/her (or revoked a job offer) because s/he did not have a professional license due to a psychiatric disability?

If an individual filed a charge on these grounds, EEOC would investigate to determine whether the professional license was required by law for the position at issue, and whether the employer in fact did not hire the individual because s/he lacked the license. If the employer did not hire the individual because s/he lacked a legally-required professional license, and the individual claims that the licensing process discriminates against individuals with psychiatric disabilities, EEOC would coordinate with the Department of Justice, Civil Rights Division, Disability Rights Section, which enforces Title II of the ADA covering state licensing requirements.

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[80] Cf. Ofat v. Ohio Civ. Rights Comm'n, 1995 WL 310051, 4 AD Cas. (BNA) 753 (Ohio Ct. App. 1995) (finding against employer, under state law, on issue of whether employee who had panic disorder with agoraphobia could safely return to her job after disability-related leave, where employer presented no expert evidence about employee's disability or its effect on her ability to safely perform her job but only provided copies of pages from a medical text generally discussing the employee's illness).

EEOC STATISTICS OF PSYCHIATRIC DISABILITY CHARGES
1992-1998

Basis	1992-98	1996	1997	1998
Anxiety	1.9%	2.4%	2.5%	3.0%
Depression	5.4%	7.4%	7.5%	8.8%
Manic Depressive	1.5%	1.9%	1.8%	1.8%
Schizophrenia	.3%	.4%	.4%	.4%
Other	4.3%	2.9%	3.0%	3.1%
% of total charges	13.4%	15.0%	15.2%	17.1%

1998 U.S. App. LEXIS 5368 printed in FULL format.

JOHN REEVES, Plaintiff-Appellant, v. JOHNSON CONTROLS WORLD SERVICES, INC.; JOEL RUSSELL, individually and in his capacity as Westchester County Airport Manager; PETER SCHERRER, individually and in his capacity as Assistant Airport Manager of the Westchester County Airport, Defendants-Appellees.

Docket No. 97-7685

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1998 U.S. App. LEXIS 5368; 7 Am. Disabilities Cas. (BNA) 1675

December 12, 1997, Argued

March 20, 1998, Decided

PRIOR HISTORY: [*1] Appeal from order and judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, Judge) granting summary judgment for defendants and dismissing plaintiff's claims under the Americans with Disabilities Act, *42 U.S.C. § 12101* et seq., and the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq. (McKinney's 1993). Plaintiff alleges that he is "disabled" for purposes of both statutes because he suffers from "Panic Disorder With Agoraphobia," which he alleges to be a mental impairment that substantially limits the major life activity of "everyday mobility." Because we hold that plaintiff has failed as a matter of law to show that his condition substantially limits a major life activity, defendants are entitled to summary judgment on the Americans with Disabilities Act claim. We vacate the grant of summary judgment on the New York Human Rights Law claim because plaintiff's impairment constitutes a "disability" within the meaning of that statute and because a triable issue of fact remains as to whether defendants' proffered reason for dismissing plaintiff is pretextual.

DISPOSITION: Affirmed in part, vacated in part, and remanded.

COUNSEL: RAYMOND [*2] G. KRUSE, Nanuet, New York, for Plaintiff-Appellant.

GUY O. FARMER, Foley & Lardner, Jacksonville, Florida (Timothy P. Coon, Pete Harrington, Bleakley Platt & Schmidt, White Plains, New York, of counsel), for Defendants-Appellees.

JUDGES: Before: ALTIMARI, WALKER, and CABRANES, Circuit Judges.

OPINIONBY: JOSE A. CABRANES

OPINION:

JOSE A. CABRANES, Circuit Judge:

Plaintiff-appellant John Reeves argues on appeal that "everyday mobility"--as he defines it--is a "major life activity" within the meaning of the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12101* et seq., that he suffers from a mental impairment that substantially limits his ability to engage in this activity, and that he is therefore entitled to invoke the protection of the ADA. He also contends that whether or not his condition qualifies as a "disability" for purposes of the ADA, it so qualifies under the New York Human Rights Law ("NYHRL"), N.Y. Exec. Law § 290 et seq. (McKinney's 1993), which he believes sweeps more broadly than the ADA. We hold that the activity described by plaintiff as "everyday mobility" does not constitute a major life activity within the meaning of the ADA, and that plaintiff [*3] therefore has not demonstrated that he is disabled for purposes of that statute. Accordingly, we affirm the order and judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, Judge) dismissing plaintiff's ADA claim. However, because we agree with plaintiff that the definition of "disability" in the NYHRL, as construed by the New York Court of Appeals, is broader than that of the ADA, we hold that plaintiff's condition does constitute a "disability" within the meaning of the NYHRL. Insofar as plaintiff has made out a prima facie case of discrimination under the NYHRL, and there exists a triable issue of fact as to

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whether defendants' proffered reason for dismissing him is pretextual, we vacate the grant of summary judgment for defendants on the state law discrimination claim and remand for further proceedings. n1

n1 Plaintiff's complaint also raised various claims under New York State common law, most of which were later withdrawn. The district court granted summary judgment for defendants on the remaining common law tort claims, but plaintiff does not appeal the dismissal of these claims. Therefore, that dismissal is unaffected by our resolution of this appeal.

[*4]

I. BACKGROUND

On appeal from a grant of summary judgment, we view the facts in the light most favorable to the nonmoving party, which in this case is the plaintiff. See *Lightfoot v. Union Carbide Corp., 110 F.3d 898, 908 (2d Cir. 1997)*. Defendant-appellee Johnson Controls World Services, Inc. ("Johnson Controls") operates the Westchester County Airport in White Plains, New York, under a contract with Westchester County. At the time of his dismissal on July 27, 1995, plaintiff-appellant John Reeves was employed by Johnson Controls as an Airport Operations Supervisor, a position to which he had been promoted in June 1993. Defendants-appellees Joel Russell and Peter Scherrer were the Airport Manager and Assistant Airport Manager, respectively.

Four years before his dismissal, during a vacation trip to Florida in July 1991, plaintiff experienced severe anxiety symptoms for the first time. At Disney World, "upon seeing the enormity of the park and of the crowd," he began to sweat, his heart began to pound, he vomited, became "more anxious than [he] had ever felt in [his] life," and passed out. Appellant's Affidavit at 1. After returning home to New York, he experienced [*5] the same symptoms whenever he contemplated going to an unfamiliar place. He found he was incapable of making any trip, even to a familiar place, if it involved "even [the] remote possibility of being caught in a traffic tie-up." Id. at 2. In May 1992, he began a six-week program at the Department of Psychiatry Phobia Clinic of the White Plains Hospital Medical Center, which he was able to attend by rearranging his work schedule. After he was promoted in June 1993, Johnson Controls sent plaintiff to attend the Norfolk Aviation Firefighters Training School in Virginia. Because of his symptoms, he was unable to fly to Virginia, and instead drove there accompanied by his aunt.

According to plaintiff, on February 23, 1995, he experienced a panic attack while at work for the first time, although he was able to complete his shift. Shortly thereafter he began seeing a psychiatrist, Dr. Marion S. Brancucci, who diagnosed him as suffering from "Panic Disorder With Agoraphobia," as defined in the Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition) of the American Psychiatric Association ("DSM-IV"). n2 According to Dr. Brancucci, plaintiff's condition led to pervasive [*6] avoidance of a variety of potentially panic-provoking situations including, among other things, "being alone outside the home or being home alone; traveling in an automobile, bus or airplane (under certain conditions); or being on a bridge." Brancucci Affidavit at 4.

n2 According to the DSM-IV, "the essential feature of Panic Disorder is the presence of recurrent, unexpected Panic Attacks . . . ." A Panic Attack is defined as "a discrete period of intense fear or discomfort that is accompanied by at least 4 of 13" symptoms, which include "palpitations, sweating, trembling or shaking, sensations of shortness of breath or smothering, feeling of choking, chest pain or discomfort, nausea or abdominal distress, dizziness or lightheadedness, derealization or depersonalization, fear of losing control or 'going crazy,' fear of dying, paresthesias, and chills or hot flushes." Joint Appendix at 72. The essential feature of Agoraphobia is listed as "anxiety about being in places or situations from which escape might be difficult (or embarrassing) or in which help may not be available in the event of having a Panic Attack." Id. at 74. "Concerns about the next attack, or its implications, are often associated with development of avoidant behavior that may meet criteria for Agoraphobia . . . , in which case Panic Disorder With Agoraphobia is diagnosed." Id. at 76.

[*7]

In early March 1995, plaintiff experienced another panic attack at work, and had to leave work an hour early. He took a leave of absence while he continued his psychiatric treatment. Dr. Brancucci prescribed Prozac for depression and Imipramine (later Klonopin) for panic disorder. In a letter to Johnson Controls dated March 29, 1995, Dr. Brancucci indicated that plaintiff "can work effectively now with unrestricted duty." She advised that she anticipated "an excellent outcome," conditioned upon plaintiff's engaging in "more daytime work in order to promote a normal sleep pattern." In a second letter dated April 6, 1995, she reiterated that plaintiff was "fully able to work," that the medication

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had "alleviated his symptoms," and that he felt "able to perform his essential job duties this time around." On April 12, 1995, plaintiff returned to work. He arranged informally to exchange some of his overnight shifts with a co-worker, allowing him to work no more than two overnight shifts per week. It is undisputed that plaintiff was fully able to perform his duties after he returned to work.

Plaintiff was dismissed by Johnson Controls on July 27, 1995. He was told that the reason for his [*8] dismissal was that he had allegedly pressured two Johnson Controls employees, Cunningham and Lindstedt, to buy union raffle tickets and then lied to his supervisors by denying that he had done so. Plaintiff vigorously contests these allegations and suggests that they were concocted by Johnson Controls as a pretext for firing him because he was disabled, or was regarded as disabled by Johnson Controls.

At his deposition, Cunningham testified that he bought a raffle ticket from another Johnson Controls employee, Jerry Brienza, while riding in a truck with Brienza and plaintiff, but that plaintiff "was basically staying out of it, trying to stay out of it." He denied that plaintiff had pressured him into buying a raffle ticket. Asked whether he ever told Johnson Controls officials that plaintiff had sold him a ticket, he testified that "I don't think that I would have said it because he didn't do it." He said he did not recall telling anyone that plaintiff had sold him a raffle ticket, although he did not categorically deny having done so. The other employee, Lindstedt, testified that he bought a raffle ticket after listening to Brienza and plaintiff talk about the raffle in order "to [*9] shut them up, because I didn't want to hear them any more." However, asked whether he ever told defendant Scherrer that plaintiff had pressured him to buy a raffle ticket, Lindstedt answered, "No, I think the way I said it is just to shut them both up I bought the ticket."

The district court granted summary judgment for defendants and dismissed plaintiff's suit, holding that "it is by no means clear that plaintiff is disabled within the [ADA]. There is no showing that he could not perform a major life activity or that he was regarded as so impaired." The court also dismissed plaintiff's NYHRL claim "for want of merit." In addition, the court concluded that plaintiff had "presented no evidence whatever which would permit a reasonable juror to find that the reason articulated for firing the plaintiff was pretextual, to cover up an unlawful intent to discriminate."

On appeal, plaintiff contends that he was disabled within the meaning of the ADA because "his panic attacks generated in him a phobic avoidance which gradually deprived him of the major life activity of everyday mobility. Because of the dread of panic attacks, [he] became hemmed in by his fears, which incapacitated him [*10] from taking vacations or even doing things as routine as going to a shopping mall alone." Appellant's Brief at 21. Plaintiff does not contend that his condition interfered with his ability to work. To the contrary, plaintiff states that when he is

> engaged in an activity such as work, or some other activity which requires his attention and his focus, his vulnerability to panic or anxiety attacks [is] significantly diminished. On the other hand, when he is placed in a situation in which he must make plans, or . . . is presented with the opportunity [of] engaging in discretionary activities which require any form of travel, even some local travel, he is subject to a rise in his levels of anxiety to one degree or another.

Id. at 12. Nor does plaintiff contend that his condition prevented him from commuting to work.

Plaintiff further suggests that his condition meets the definition of "disability" under the NYHRL because he suffers from a "mental . . . impairment . . . demonstrable by medically accepted clinical . . . diagnostic techniques." N.Y. Exec. Law § 292(21). Finally, plaintiff maintains that the deposition testimony of Cunningham and Lindstedt created [*11] a triable issue of fact as to whether Johnson Controls used trumped-up allegations of misconduct as a pretext for dismissing him because of his alleged disability, and that the district court therefore erred by granting defendants' motion for summary judgment.

II. DISCUSSION

We review the district court's order granting summary judgment de novo. See *Beatie v. City of New York, 123 F.3d 707, 710 (2d Cir. 1997)*. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. In determining whether a genuine issue of material fact exists, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* (citation omitted).

A. The ADA Claim

The ADA provides that "no covered entity shall discriminate against a qualified individual with a disability

because of the disability [*12] of such individual in regard to . . . discharge of employees. . . ." *42 U.S.C. § 12112*(a). In order to make out a prima facie case of discriminatory discharge under the ADA, a plaintiff must show that (1) his employer is subject to the ADA; (2) he suffers from a disability within the meaning of the ADA; (3) he could perform the essential functions of his job with or without reasonable accommodation; and (4) he was fired because of his disability. See *Ryan v. Grae & Rybicki, P.C., F.3d , 1998 U.S. App. LEXIS 1863 (2d Cir. Feb. 4, 1998), 1998 WL 50127*, at *2 (citations omitted). Defendants argue that plaintiff has failed to show that he is an individual with a disability within the meaning of the ADA, and therefore has not made out a prima facie case of discrimination.

The ADA defines "disability" as follows:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Plaintiff does not claim to have a record of impairment. Rather, he suggests that he is disabled either because he has a mental impairment [*13] that substantially limits a major life activity or because he was regarded as having such an impairment by Johnson Controls. We consider each of these alternative theories of disability in turn.

1. Impairment "Substantially Limits" a "Major Life Activity"

The Equal Employment Opportunity Commission ("EEOC") has promulgated administrative regulations implementing the ADA. See 29 C.F.R. § 1630 ("EEOC regulations"). n3 They define a "physical or mental impairment" as, inter alia, "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2) (emphasis added). The parties do not appear to dispute, and we see no reason to question, that Panic Disorder With Agoraphobia constitutes a "mental impairment" for purposes of the ADA. See *Zirpel v. Toshiba America Info. Sys., Inc., 111 F.3d 80, 81 (8th Cir. 1997)* ("[Plaintiff] suffers from a mental impairment, panic disorder . . . ."). Rather, the principal question presented is whether this impairment can be said to "substantially limit[]" one or more "major life activities." *42 U.S.C. § 12102*(2). [*14]

n3 "We accord great deference to the EEOC's interpretation of the ADA, since it is charged with administering the statute." *Francis v. City of Meriden, 129 F.3d 281, 283 n.1 (2d Cir. 1997)* (internal quotation marks and citation omitted).

According to the EEOC, the term "substantially limits" means, in pertinent part, "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii). "Major life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). As the words "such as" suggest, this list of major life activities is meant to be illustrative and not exclusive. See Ryan, *F.3d at , 1998 WL 50127*, at *3 ("The listed activities are 'examples [*15] only . . . .'") (citing EEOC, Americans with Disabilities Act Handbook I-27 (1992)); *Abbott v. Bragdon, 107 F.3d 934, 940 (1st Cir. 1997)* ("As the regulation itself clearly indicates, this enumeration is not meant to be exclusive. . . ."), cert. granted in part, *118 S. Ct. 554, 139 L. Ed. 2d 396 (U.S. 1997); Sutton v. United Air Lines, Inc., 130 F.3d 893, 900 (10th Cir. 1997)* (major life activity "includes, but is not limited to," the activities listed in the EEOC regulations).

In this case, plaintiff does not claim that his impairment substantially limits him in the exercise of any of the major life activities listed in the EEOC regulations. He does not, for example, claim that he is substantially limited in his ability to walk or work. Instead, he urges us to recognize as a major life activity, within the meaning of the ADA, the activity he styles as "everyday mobility," and he directs our attention to several cases for supporting authority. n4 We begin by noting that none of these cases actually uses the amorphous term "everyday mobility." Rather, these cases, all decided under the Rehabilitation Act of 1973 ("RHA"), *29 U.S.C. § 701* et seq., n5 use terms such [*16] as "mobility disabled" and "mobility handicapped." In context, it appears that the cited cases use these terms to mean individuals who are physically unable to walk or are wheelchair-bound. In other words, these are cases primarily concerned with what the EEOC regulations refer to as the major life activity of "walking." Inasmuch as plaintiff does not claim that his impairment limits his ability to walk, these cases are not on point. Otherwise, plaintiff cites no authority,

from this or any other court, for the proposition that "everyday mobility," as he defines it, is cognizable as a major life activity for purposes of the ADA.

n4 The cases cited by plaintiff are *Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977)*, *Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977)*, and *United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977)*. See Appellant's Supplemental Letter Brief at 1. Each of these cases concerned legal challenges brought by individuals confined to wheelchairs against transportation authorities, alleging that they failed to make transportation facilities accessible to the disabled.

[*17]

n5 As a general matter, "because the ADA and the RHA are very similar, we look to caselaw interpreting one statute to assist us in interpreting the other." See *Francis, 129 F.3d at 284 n.4.*

The ADA's requirement that, in order to constitute a disability under its terms, an impairment must substantially limit a major life activity underscores that "the impairment must be significant, and not merely trivial." *Sutton, 130 F.3d at 898* (citation omitted); see also *Runnebaum v. Nationsbank of Maryland, 123 F.3d 156, 167 (4th Cir. 1997)* (en banc) (same); *Byrne v. Board of Educ., 979 F.2d 560, 564 (7th Cir. 1992)* ("The statute's inclusion of the limiting adjectives 'substantial' and 'major' emphasizes that the impairment must be a significant one.") (RHA case). That is, not any limitation, but only a "substantial" limitation, of not any life activity, but only a "major" life activity, will constitute a disability within the meaning of the statute. See Ryan, *F.3d at , 1998 WL 50127*, at *3 ("In assessing whether a plaintiff has a disability, courts have been careful to [*18] distinguish impairments which merely affect major life activities from those that substantially limit those activities."); *Knapp v. Northwestern Univ., 101 F.3d 473, 481 (7th Cir. 1996)* ("Not every impairment that affects an individual's major life activities is a substantially limiting impairment.").

In the absence of a statutory definition, we construe statutory terms such as "major life activities" in accordance with their ordinary and natural meaning. See *Smith v. United States, 508 U.S. 223, 228, 124 L. Ed. 2d 138, 113 S. Ct. 2050 (1993)*. The term "major life activity," by its ordinary and natural meaning, directs us to distinguish between life activities of greater and lesser significance. See *Runnebaum, 123 F.3d at 170* ("An activity qualifies under the statutory definition as one of the major life activities contemplated by the ADA if it is relatively more significant or important than other life activities."); *Abbott, 107 F.3d at 940* (dictionary definitions of the term "major" "strongly suggest that the touchstone for determining an activity's inclusion under the statutory rubric [of major life activity] is its significance").

The determination of whether [*19] an individual is disabled under the ADA is made on an individualized, case-by-case basis. See Ryan, *F.3d at , 1998 WL 50127*, at *5 ("The determination whether an impairment 'substantially limits' a major life activity is fact specific. . . .") (citing *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 59 (4th Cir. 1995)*); *Sutton, 130 F.3d at 897* (ADA "contemplates an individualized, and case-by-case determination of whether a given impairment substantially limits a major life activity of the individual"); *Runnebaum, 123 F.3d at 166* ("[A] finding that [a plaintiff] has a disability . . . must be made on an individualized basis."). Accordingly, we held in our recent decision in Ryan that the plaintiff's physical impairment, "ulcerative colitis," in his particular case did not substantially limit the major life activity of "caring for oneself," but we emphasized that "our decision does not mean that colitis may never impose such a limitation." *F.3d at , 1998 WL 50127*, at *5 (emphasis added).

At the same time, we generally agree with the observation of the en banc Court of Appeals for the Fourth Circuit in Runnebaum that "the [*20] [ADA]—with its reference to 'the major life activities'—implies that a corresponding case-by-case inquiry into the connection between the plaintiff and the major life activity is not necessary." *123 F.3d at 170* (emphasis in the original). We must determine "whether the impairment at issue substantially limits the plaintiff's ability to perform one of the major life activities contemplated by the ADA, not whether the particular activity that is substantially limited is important to him." Id. (emphasis added and citation omitted); see *Abbott, 107 F.3d at 941* (suggesting, without deciding, that the need for a case-by-case analysis of disability "does not necessarily require a corresponding case-by-case inquiry into the connection between the plaintiff and the major life activity"). We do not think that such major life activities as seeing, hearing, or walking are major life activities only to the extent that they are shown to matter to a particular ADA plaintiff. Rather, they are treated by the EEOC regulations and by our precedents as major life activities per se. A plaintiff claiming that her asthma substantially limits her ability to engage in the major [*21] life activity of breathing is not first asked to prove that breathing is a major life activity for her. See, e.g., *Heilweil v. Mount Sinai*

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Hospital, 32 F.3d 718, 723 (2d Cir. 1994). Likewise, in Ryan, the plaintiff's colitis was found in the circumstances presented in that case not to substantially limit the major life activity of "caring for oneself." *F.3d at , 1998 WL 50127*, at *5. But whether caring for oneself is a major life activity did not turn on the particular facts of that case. Generally, it is only in connection with the determination of whether an impairment "substantially limits" a particular plaintiff's exercise of a major life activity that an individualized inquiry is required.

The need to identify a major life activity that is affected by the plaintiff's impairment plays an important role in ensuring that only significant impairments will enjoy the protection of the ADA. An ADA plaintiff could considerably lessen the burden of making an individualized showing of a substantial limitation were he able to define the major life activity as narrowly as possible, with an eye toward conforming the definition to the particular facts of his own case. For [*22] example, while it might be hard to show that a very mild cough substantially limits the major life activity of "breathing," it would be far easier to make an individualized showing of a substantial limitation if the major life activity were instead defined more narrowly as, say, the major life activity of "breathing atop Mount Everest." Depending upon how narrowly he may frame the scope of the "major life activity," the plaintiff's burden of making an individualized showing of substantial limitation will vary accordingly. In this regard, we underscore the basic principle, noted above, that the ADA does not guard against discrimination based upon any physical or mental impairment but only those impairments that are significant. Narrowing and diluting the definition of a major life activity, which in turn might lessen the plaintiff's burden of proving a substantial limitation, would undermine the role of the statute's "substantial limitation" inquiry in ensuring that only impairments of some significance are protected by the ADA.

In the instant case, by tailoring his definition of the major life activity to fit the circumstances of his impairment, plaintiff would materially lessen [*23] his burden of showing a substantial limitation for purposes of the ADA. Plaintiff does not claim that his Panic Disorder With Agoraphobia limits the major life activity of walking. He narrows the frame of reference and hypothesizes a major life activity called "everyday mobility," which he then defines (so far as he does attempt to define it) largely by means of examples that are coextensive with his symptoms. "Everyday mobility," as he defines it, appears to consist of "taking vacations or even doing things as routine as going to a shopping mall alone," Appellant's Brief at 21, taking ground transportation "along a route which might cause [one] to cross a bridge or tunnel or to travel on high roads," Appellant's Supplemental Letter Brief at 2, going to "unfamiliar places that would involve staying overnight," and riding "unaccompanied in trains." Id. Were we to accept this narrow and conveniently form-fitting definition of a major life activity called "everyday mobility," plaintiff would effectively circumvent the hurdle imposed upon him by the statute of establishing that his particular impairment substantially limits a major life activity. If the courts permit individual [*24] tailoring of the scope of the major life activity, the case-by-case inquiry into whether an impairment entails a "substantial limitation" is essentially fixed from the outset--it is, in short, pre-determined by a plaintiff.

In addition, it is uncontested that plaintiff traveled to and from his employment at Johnson Controls from April 12, 1995, the date of his return to work after his last panic attack, to July 27, 1995, his termination date. Where a plaintiff is sufficiently mobile to travel to and from work on a regular basis, but is unable to travel over bridges or through tunnels, to board trains unaccompanied, or to drive along routes prone to traffic tie-ups and over high roads, he has not alleged a limitation of the kind of "everyday mobility" that might constitute a "major life activity" within the meaning of the ADA. Plaintiff does not, for example, claim that he was so immobile as a result of his mental impairment that he was unable to leave his house or to go to work. While we do not doubt that there are activities other than those listed in the EEOC regulations that are major life activities, see Ryan, *F.3d at , 1998 WL 50127*, at *3, and while some activity more [*25] "major" than plaintiff's definition of "everyday mobility" may well constitute such, we are not persuaded that "everyday mobility," as narrowly defined by plaintiff in this case, is such a "major life activity."

2. "Regarded As Having Such An Impairment"

Even though plaintiff has not shown that he suffers from an impairment that substantially limits a "major life activity" within the meaning of the ADA, he would still be considered "disabled" for purposes of that statute if he could show that he was "regarded as having such an impairment." *42 U.S.C. § 12102*(2)(C). The EEOC regulations elaborate upon this provision of the ADA's definition of disability as follows:

Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit a major life activity but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined [by the EEOC regulations] but is treated by a covered entity as having [*26] a substantially limiting impairment.

29 C.F.R. § 1630.2(l).

Plaintiff does not argue that he is substantially limited in a major life activity only because of "the attitudes of others toward [his] impairment." Id. § 1630.2(l)(2). Nor does he deny having an impairment but assert that he is "treated by [his employer] as having a substantially limiting impairment." Id. § 1630.2(l)(3). He does implicitly invoke the first prong of the EEOC definition of "regarded as" disability by asserting that "a reasonable jury [could] conclude that the Appellees perceived the Appellant as being disabled or substantially limited in his ability to perform a major life activity under the ADA." Appellant's Reply Brief at 6.

Defendants do not dispute that Johnson Controls knew of plaintiff's diagnosed mental impairment before he was dismissed. However, "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action." *Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996)*. Plaintiff must show that defendants perceived his [*27] impairment as substantially limiting the exercise of a major life activity. Plaintiff does not specify which major life activity defendants allegedly perceived as substantially limited by his mental impairment. We reject the possibility that defendants perceived plaintiff as substantially limited in his ability to engage in "everyday mobility" not only because we conclude that, as defined by plaintiff in this case, "everyday mobility" is not a major life activity, see II.A.1, supra, but because plaintiff presents no evidence tending to show that defendants perceived it as such.

Although the argument is not clearly advanced by plaintiff, we also consider the possibility that defendants perceived plaintiff as limited in the major life activity of "working." An individual is substantially limited in the ability to work only if he is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs." 29 C.F.R. § 1630.2(j)(3)(i); see *Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 383-84 (2d Cir. 1996)* ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."). [*28] In this case, the parties agree that plaintiff's impairment did not interfere with his ability to perform his essential job functions. Indeed, plaintiff asserts that when he is engaged in "an activity such as work, or some other activity which requires his attention and his focus, his vulnerability to panic or anxiety attacks [is] significantly diminished." Appellant's Brief at 12. In this light, even drawing all reasonable inferences in favor of plaintiff, as we must in reviewing the grant of summary judgment for defendants, there is no basis for concluding that defendants viewed plaintiff as being substantially limited in his ability to work in his then-current position, much less in "a broad range of jobs." 29 C.F.R. § 1630.2(j)(3)(i). Accordingly, we hold that plaintiff was not "regarded as" having a disability. Because plaintiff neither suffered from, nor was regarded as having, a disability within the meaning of the ADA--and thus is not disabled for ADA purposes--he has failed to make out a prima facie case of discrimination under the statute, and we are required to affirm the summary judgment entered for defendants on the ADA claim.

B. The New York Human Rights Law [*29] Claim

1. "Disability"

Plaintiff maintains that his mental impairment constitutes a disability for purposes of the NYHRL, whether or not it satisfies the ADA's definition of disability. He contends that the NYHRL defines disability more broadly than does the ADA, and that unlike the federal statute, the state statute does not require him to identify a major life activity that is substantially limited by his impairment. The clear and controlling authority of the New York Court of Appeals' decision in *State Division of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 491 N.Y.S.2d 106, 480 N.E.2d 695 (1985)*, compels us to agree.

The NYHRL defines "disability" in pertinent part as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . . ." N.Y. Exec. Law § 292(21) (McKinney's 1993) (emphasis added). n6 Although the definition is phrased in the disjunctive--"or is demonstrable by medically accepted clinical or laboratory diagnostic techniques"--defendants [*30] would have us look exclusively to the first clause of the definition, which seems to resemble the definitions contained in the RHA and ADA. Drawing on district court cases, they argue that the legislative history of the NYHRL clarifies that "'New York contemplated coverage of the same types of disabilities covered by the federal laws.'" Appellees' Brief at 21

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(quoting *Fitzgerald v. Alleghany Corp., 904 F. Supp. 223, 229 n.12 (S.D.N.Y. 1995)* (citing Executive Dept. Memorandum, 1983 McKinney's Session Laws of N.Y., at 2705)); see also *Hendler v. Intelecom U.S.A. Inc., 963 F. Supp. 200, 210 (E.D.N.Y. 1997)* ("The legislative history of the [NYHRL] indicates that it was intended to cover the same types of disabilities as protected under the ADA and the Rehabilitation Act. . . .").

n6 At the time this action was commenced, the NYHRL's definition of disability read in full:

> The term 'disability' means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held."

N.Y. Exec. Law § 292(21) (McKinney's 1993). In the instant case, the defendants do not appear to argue that plaintiff was unable to perform the essential functions of his job in a "reasonable manner." The above definition was amended in 1997; the amendment, which did not alter the portion of the definition relevant to this appeal, became effective on January 1, 1998. N.Y. Exec. Law § 292(21) (McKinney's Supp. 1997).

[*31]

Defendants' argument regarding the legislative history of the New York statute is a strong one, but they overlook--and, indeed, fail to cite--the construction of the statutory definition of disability in the New York Court of Appeals' Xerox decision. At issue in that case was the refusal by Xerox to hire the complainant because she had been diagnosed after a medical examination as suffering from "active gross obesity." *Xerox, 491 N.Y.S.2d at 107.* The complainant did not allege that her condition limited a major life activity. In fact, she testified that her condition "had not prevented her from performing any task or function. . . . [and] had not inhibited her in any way, except in carrying bundles for long distances." Id. Xerox argued that the plaintiff was not disabled within the meaning of the NYHRL "because there is no evidence that her condition presently places any restrictions on her physical or mental abilities." Id. at 109. The court rejected this argument and held that the plaintiff had proved she was disabled for purposes of the state statute. It will be useful to quote from the opinion of New York's highest court at some length:

> [Xerox's] [*32] argument[] might have some force under typical disability or handicap statutes narrowly defining the terms in the ordinary sense to include only physical or mental conditions which limit the ability to perform certain activities (see, e.g., [the RHA], defining a "handicapped individual" n7 as a person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities"). However[,] in New York, the term "disability" is more broadly defined. The statute provides that disabilities are not limited to physical or mental impairments, but may also include "medical" impairments. In addition, to qualify as a disability, the condition may manifest itself in one of two ways: (1) by preventing the exercise of a normal bodily function or (2) by being "demonstrable by medically accepted clinical or laboratory diagnostic techniques" [ ].
>
> Fairly read, the statute covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future. . . . Thus, the Commissioner [*33] [of the State Division of Human Rights] could find that the complainant's obese condition itself, which was clinically diagnosed and found to render her medically unsuitable by the respondent's own physician, constituted an impairment and therefore a disability within the contemplation of the statute.

Id. (emphasis added).

n7 The definition of disability in the RHA was amended in 1992 to substitute the term "disability" for "handicaps." *Francis, 129 F.3d at 285 n.6* (citing Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(f)(1)(A), 106 Stat. 4344, 4348).

This literal reading of the statute, taking no account of the seemingly clear legislative purpose to enact a definition of disability coextensive with comparable federal statutes, treats a medically diagnosable impairment as necessarily a disability for purposes of the NYHRL. "Thus, an individual can be disabled under the [NYHRL] if his or her impairment is demonstrable by

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medically accepted techniques; it is not required [*34] that the impairment substantially limit that individual's normal activities." *Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697, 706 (S.D.N.Y. 1997)*. Regardless of the legislative history of the NYHRL (as noted and followed by the district courts in Fitzgerald and Hendler) indicating that the statutory definition of disability was intended to be coextensive with that of the federal disability statutes, we are bound by the construction of the statute propounded by the state's highest court. See *Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465, 18 L. Ed. 2d 886, 87 S. Ct. 1776 (1967)* ("The State's highest court is the best authority on its own law."); *West v. American Tel. & Tel. Co., 311 U.S. 223, 237, 85 L. Ed. 139, 61 S. Ct. 179 (1940)* (stating that a federal court must "ascertain from all the available data what the state law is and apply it rather than . . . prescribe a different rule, however superior it may appear"); 17 James Wm. Moore et al., Moore's Federal Practice § 124.20[1] (3d ed. 1997) ("The state highest court is the final arbiter of state law.").

In a recent case, the New York Court of Appeals reaffirmed its construction [*35] of the NYHRL in Xerox. See *Alesci v. New York State Div. of Human Rights, 689 N.E.2d 898, 666 N.Y.S.2d 1004, 1997 WL 773684*, at *3 (N.Y. 1997). In Alesci, the complainant flight attendants argued that they were disabled because they were "overweight," as determined by the employer's weight standards. The court held that the complainants were not disabled for purposes of the NYHRL, as construed in Xerox, because they "did not proffer evidence or make a record establishing that they are medically incapable of meeting [the airline's] weight requirements due to some cognizable medical condition. That was crucial in Xerox and is utterly absent here." Id. at *3 (emphasis added).

In the instant case, defendants do not dispute that plaintiff was diagnosed after examination by a licensed psychiatrist as suffering from a mental impairment--Panic Disorder With Agoraphobia. On appeal, defendants do not appear to challenge the reliability or accuracy of this diagnosis, nor have they suggested that the diagnosis was not based upon "medically accepted clinical . . . diagnostic techniques." N.Y. Exec. Law § 292(21) (McKinney's 1993). Had they challenged the diagnosis, this would at most have [*36] created a triable issue of fact as to whether or not plaintiff suffered from a mental impairment. Resolving all ambiguities and drawing all inferences in favor of plaintiff, as we must in reviewing the entry of summary judgment for defendants, we find that plaintiff's medically diagnosed Panic Disorder With Agoraphobia constitutes a disability within the meaning of the NYHRL. Accordingly, plaintiff has made out a prima facie case of discrimination under the NYHRL. n8

n8 Although in this appeal plaintiff does not advance the argument that he was disabled within the meaning of the NYHRL because he had a "condition regarded by others as such an impairment," N.Y. Exec. Law § 292(21), we note that in light of the fact that defendants were aware of Dr. Brancucci's medical diagnosis that plaintiff suffered from a mental impairment, there would also appear to be a triable issue of fact (in connection with the state law claim only) as to whether they regarded him as having a "mental . . . impairment . . . demonstrable by medically accepted clinical . . . diagnostic techniques." N.Y. Exec. Law § 292(21).

[*37]

2. Pretext

Defendants maintain that even if plaintiff is disabled for purposes of the NYHRL, they did not violate the statute because they dismissed plaintiff for a legitimate, non-discriminatory reason--namely, for alleged misuse of his authority and lying to his superiors. n9 The district court found that no triable issue of fact exists as to whether this proffered basis for the dismissal is merely a pretext for what was actually a dismissal based upon a discriminatory motive. However, we think it is clear that--resolving all ambiguities in favor of plaintiff--the deposition testimony of Cunningham and Lindstedt, the two employees whom plaintiff is alleged to have pressured to buy raffle tickets, standing alone, creates a triable issue of fact as to whether defendants' proffered reason is pretextual.

n9 In adjudicating NYHRL claims, New York courts use the familiar burden-shifting framework developed in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*. See *North Shore Univ. Hospital v. Rosa, 86 N.Y.2d 413, 633 N.Y.S.2d 462, 464, 657 N.E.2d 483 (N.Y. 1995)* (citing McDonnell Douglas) (additional citations omitted).

[*38]

In their sworn deposition testimony, both Cunningham and Lindstedt denied that plaintiff pressured them to buy raffle tickets, contradicting defendants' story. Both also denied having told anyone that they had been pressured to buy a ticket by plaintiff. Cunningham maintained that he bought a ticket from another employee, Jerry Brienza,

not plaintiff. Although he did not categorically deny having told others that he bought a ticket from plaintiff, he testified that he did not recall having done so, and that "I don't think that I would have said it because he didn't do it."

The district court concluded that "this Court is not the place to try the issue of whether [plaintiff] did in fact lie; all that needs to be shown is that after reasonable inquiry, defendants thought he did, and they fired him for it in good faith, and not because he was disabled, if indeed he was." However, we find that the inconsistencies between the deposition testimony of Cunningham and Lindstedt and the version of events recounted by defendants at least create a triable issue as to the true motivation for plaintiff's dismissal. To the extent that these inconsistencies can only be resolved based upon credibility [*39] determinations, such questions of witness credibility are to be decided by the jury. See, e.g., *Rodriguez v. City of New York, 72 F.3d 1051, 1061 (2d Cir. 1995)* ("On a summary judgment motion, the court is not to weigh the evidence, or assess the credibility of witnesses, or resolve issues of fact.").

Accordingly, because we find that plaintiff has made out a prima facie case of discrimination under the NYHRL, as it has been interpreted by the New York Court of Appeals, and that a triable issue of fact remains, the grant of summary judgment for defendants on the NYHRL claim is vacated, and the cause is remanded for further proceedings.

III. CONCLUSION

To summarize:

(1) Because we find that plaintiff's impairment does not substantially limit a major life activity, and because he was not regarded as being so limited, he is not disabled within the meaning of the ADA. Summary judgment for defendants on the ADA claim is affirmed.

(2) Because we find that plaintiff's mental impairment constitutes a disability within the meaning of the NYHRL, as construed by New York's highest court, and that a triable issue of fact exists as to whether defendants' asserted reason for dismissing [*40] plaintiff is pretextual, the grant of summary judgment for defendants on the NYHRL claim is vacated.

(3) The case is remanded for further proceedings consistent with this opinion.

THE ROLE OF THE BOARD OF EDUCATION IN COLLECTIVE NEGOTIATIONS

Remarks of
MELVIN H. OSTERMAN
WHITEMAN OSTERMAN & HANNA
At the
1998 Law Conference of the
Capital Area School Development Association,
Century House, Latham, NY

July 16, 1998

The members of the Committee that Governor Rockefeller appointed, whose work led to the enactment of the Taylor Law. all had distinguished records in higher education and in private sector collective bargaining. They didn't know, however, a lot about the State of New York. They were used to an organized Federal-type structure in which there were cleanly defined, separate executive and legislative bodies. The unique structure of school districts did not conform to their experience.

Not to be dissuaded by mere facts, however, the Committee drove forward and recommended a comprehensive system of collective negotiations that covered school districts as well as cities, towns, village, counties and the State itself. The law it proposed, and ultimately the law the State Legislature enacted, called for collective negotiations to be conducted by a chief

executive officer and then ratification, as to matters requiring the expenditure of money, by a legislative body.

School districts do not fit that model. While the superintendent is chief executive officer, he or she does not exist independent of the Board. Instead, the superintendent is an employee of the Board. While a superintendent has responsibilities granted by the Education Law, his or her powers derive in great part from board policy, the provisions of an employment contract, or the delegation of additional specific responsibilities by the Board of Education.

When it enacted the law, the Legislature helped some by designating the Superintendent of Schools as the "chief executive officer" for purposes of collective negotiations. That designation has some significance. As the chief executive officer, the superintendent has independent authority to negotiate terms and conditions of employment which do not require the expenditure of funds. As long as it does not spend money, at least for Taylor Law purposes the superintendent is the public employer.

Having so designated the Superintendent, the Legislature acted to make the situation even more complicated. Several years after the Taylor Law first became law, the Legislature enacted Section 204-a. You know that section. It is in every one

of your contracts. The law says that it must be. Your contract must state:

> It is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefore shall not become effective until the appropriate legislative body has given approval.

Since I was in the room when this language was written, I can tell you something about its origins. You may recall that Malcolm Wilson was Lieutenant Governor for 15 of the years that Nelson Rockefeller was Governor. He then succeeded Rockefeller as Governor. Prior to his service as Lieutenant Governor, Malcolm had been an Assemblyman from Westchester County for more than 20 years. Malcolm felt strongly about the maintenance of legislative prerogatives.
Section 204-a is an expression of those prerogatives, While the Taylor Law cedes the determination of many terms and conditions of employment to the executive., Malcolm wanted a reaffirmation of the role of the legislature. Section 204-a is that reaffirmation.

The rule of Section 204-a was both extended and confused by the Legislative initiative in abolishing the legislative hearing as the last step of the impasse procedure in collective negotiations in school districts. In providing that the Board could no longer resolve a dispute in negotiations and by consigning impasses to superconciliation--or probably more appropriately super-limbo—the Legislature further confused the role of the Superintendent and the Board In support of the bill before the Legislature NYSUT argued that it was unfair to have the Board of Education at the bargaining table and when the negotiations went to impasse, putting on its legislative hat and resolving the dispute.

That argument is at the core of the Legislature's action. What happened to the role of the superintendent as executive and the board as legislative body? The analysis is simply not made and, since the 70's we have far too often been consigned to a process of unending negotiations.

I said I could tell you how Section 204-a came about. I have greater difficulty telling you what Section 204-a means. Some things are obvious. A provision of a collective bargaining agreement that grants employees time off is likely not to involve the expenditure of funds. It does not require legislative approval. But what exactly is a provision which requires legislative action to permit implementation by amendment of law or by providing additional funds therefore? If your budget has been passed and

contains funds sufficient to pay for a salary increase, is legislative approval required? Suppose money is there but it must be shifted between lines to put the money in the right place. Is legislative action required under those circumstances? Suppose, as is not unusual, the Board has delegated responsibility to make budget transfers to the superintendent. Has it delegated itself out of a role in the implementation of a collective bargaining agreement? These are not theoretical issues, as the Buffalo Board of Education found in a case we will turn to later this morning.

Someday, somewhere, many of these issues will be litigated. Lawyers are, after all, a creative lot. There is, however, something a Board can do today to protect itself against unnecessary litigation and to preserve its role in the process. It should take that step at the very first negotiating session. At the time when ground rules are being established, the District can confirm that, just as the contract is subject to ratification by the members of the union, it also is subject to ratification by the Board of Education. That ratification would encompass both the economic terms of the agreement -- those requiring the expenditure of funds -- and the myriad non-economic items which are part of most negotiations. While the superintendent is the chief executive officer, nothing in the Taylor Law prevents this as a ground rule.

Many of you have such a clause in your ground rules. This, particular ground rule, unlike many other ground rules, has substantive significance. It preserves the Board of Education's role. It is not merely a statement that the Board is concerned about the possibility of improvident acts of a superintendent. Instead, it gives the superintendent or the District's negotiator a tool to use in the bargaining process. The concerns, not merely of the superintendent or the administration, come to the table. The responsibilities and views of the members of the Board, as elected public officials, become part of the bargaining process.

A *caveat* is appropriate here. If you reserve to yourself the right to ratify an agreement, the ratification process itself is subject to the statute's obligation to bargain in good faith. You cannot, if you have agreed that the agreement is subject to your ratification, avoid your responsibility simply by not acting. The Utica City School District learned this recently. *Matter of Utica City School District*, 26 PERB ¶ 4652 (1993). There the Board simply failed, without excuse or explanation, to consider the tentative collective bargaining agreement or to vote on whether or not to ratify it. PERB found that failure to act to be an improper practice. As PERB does in these cases, it simply imposed the contract on the school district, even without ratification.

Let me turn briefly to the role of the Board on the District's negotiating team.

It is a well-established Taylor Law principle that unless a member of the negotiating team announces unequivocally, at the negotiating table, that he or she objects to the terms of the tentative agreed, that member must support that agreement as part of the ratification process. The team member may present options to the full Board, but he or she is required, in good faith, to urge ratification of the agreement by the Board.

This rule is obviously of significance when a Board of Education member is placed on a negotiating team. If the District team consists of a majority of the members of the Board of Education there is, in effect, no longer a ratification process. Each member of the team is required to support the agreement and by definition, that agreement now has majority support.

How you put together a negotiating team goes well beyond the scope of these remarks. There are some districts where Board members do not participate at all and reserve to themselves the right to judge the agreement as a whole. Some districts do not ask the superintendent to serve as a member of the negotiating team, preferring to draw any heat in the negotiating process away from the superintendent. There is a theory that you include minority members of a Board on the negotiating team in order to co-opt them as part of the bargaining process. Much of this is a matter of style. Just as school districts differ as to the amount of latitude that is provided to the superintendent, so too are

there differences as to the composition of the negotiating team. However you put together your team, as a matter of law, every member you put on the negotiating team is a yes vote for ratification.

There is no case law establishing the standard by which the Board of Education must use to make its decision to ratify or not to ratify in agreement. The *Utica* case mentioned earlier suggests that the general Taylor Law standard of good faith would apply.

The number of cases in which Boards have turned over agreements in almost 30 years of the Taylor Law are relatively few in number. One of them, however, is both recent and significant to our topic this morning. That case *is Board of Education of the City School District of the City of Buffalo* v. *Buffalo Teachers Federation*, decided by the Court of Appeals in 1996. 89 NY2d 370 (1993).

In October 1990, the negotiating teams for the City School District and the Teachers Association reached a four-year agreement, which the union membership ratified. Before the superintendent executed the agreement, however, he submitted it to the Board of Education for ratification. The Board, by a five to four vote, refused to approve the agreement.

Because the District's negotiator had not supported the agreement before the Board, the union brought an improper

practice charge before PERB. PERB found the negotiator's lack of affirmative recommendation constituted a failure to negotiate in good faith and directed that the District execute a document embodying the agreements reached at the bargaining table. PERB declined to order the Board of Education to implement the agreement on the ground that it lacked jurisdiction to grant that remedy.

The Board of Education then did a curious thing. In the first sentence of a two-sentence resolution, it directed superintendent to execute a document embodying the negotiated agreement on behalf of the District. In the second sentence, however, the Board reserved to itself its rights under Section 204-a to ratify that agreement.

The issue presented to the Court of Appeals was whether the Board's action was effective. The Court held that was not and, along the way, made a number of interesting observations.

The NEA, the union representing the teachers argued that the Buffalo Board of Education did not have any power of ratification. Since Buffalo is a fiscally dependant school district taxes were levied by the City of Buffalo, not by the Board of Education. The Board answered that the allocation of funds within budgeted amounts was a legislative act which was required prior to implementation of the agreement. The Court noted NEA's argument, but did not rule on it.

What the court actually ruled was that when the Board got involved in the process, by directing the Superintendent to execute the contract, it could not then reserve to itself a second bite of the apple. When the Board directed the superintendent to execute the agreement, the Court found that it used up all of the authority it had under the Taylor Law. It could not assert that it was exercising some quasi-executive responsibility under the Taylor Law and reserving to itself the true legislative responsibility.

Buffalo Board of Education has raised quite a lot of controversy. It has been argued by some that it restricts a Board of Education's right to ratify an agreement and, I guess in a sense, it does that. On the other hand, I think the significance of the case has been overstated. While Judge Bellacosa's opinion is not the clearest his decision seems to turn on the language of the Board's resolution. What *Buffalo Board of Education* suggests at the moment is that there is some care required when the Board considers the ratification of an agreement.

Still unresolved by case law is the question, related to the Buffalo decision, whether a board of education has a legislative function that is different than its role in the negotiations process. Are there some things it can do as a Board that are not to be reviewed in Taylor Law negotiations? The leading cases is one brought by Council 82 AFSCME, involving the Executive

Branch of State government. There, Council 82 sued the Governor because he had signed legislation that adversely impacted the pension benefits of State correction officers. Council 82 argued that the Governor was the public employer ands that he could not take an action which impacted the terms and conditions of employment of bargaining unit members. Not so said PERB. In approving or even in recommending legislation it found that the Governor was not acting as an employer. He was, instead, exercising his constitutional responsibilities as the State's executive officer.

This is an interesting concept. Are their actions a Superintendent or a Board may take that can be argued to be immune to challenge under the Taylor Law? Hopefully the more imaginative among us will, in the years ahead move this area of the law forward.

All of the foregoing appear to establish some basic rules determining the role of the Board of Education in the Taylor Law system. These would include the following:

1. A Taylor Law negotiating agreement cannot take effect until a Board of Education has taken whatever legislative action may be appropriate to permit the implementation of the agreement.

2. The allocation of money between the lines in a budget probably is a legislative action and if the agreement requires transfers, the Board has a right of ratification.

3. To protect the Board's right of ratification, an express right or ratification by the Board of Education should be part of the ground rules in every negotiation. That would give rise to a contract as well as statutory rights.

4. Care should be exercised in the designation of members of the Board of Education to the negotiating team. Every person designated to the team is one less vote required for ratification. If the Board wants to retain some distance from the process, few, if any, members should be placed on the negotiating team.

5. The Board can exercise whatever control it wishes over the bargaining process by requiring copies of minutes or periodic reports by its negotiators. There really is no substantive necessity for independent representation at the bargaining table. Showing the flag may be important or useful, but control of the process

can be achieved without taking any risk that the action can be used against the District's interests.

Thank you.

PRESENTATION TO

CAPITAL AREA SCHOOL DEVELOPMENT ASSOCIATION

July 16, 1998

RECENT DEVELOPMENTS AT PERB

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121 State Street
Albany, New York 12207

*Former Chairwoman,
NYS Public Employment
Relations Board

I. RECENT DEVELOPMENTS UNDER THE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

Legislation

School districts and BOCES are prohibited from diminishing retiree health insurance benefits unless a corresponding diminution is made from active employees. (June 30, 1994 -- May 15, 1999) (1998 N.Y. Laws Ch. 68).)

Injunctive relief extended to June 30, 1999 (1997 N.Y. Laws ch. 172).

Interest arbitration provisions extended two years (1997 N.Y. Laws ch. 149 and 154).

Agency shop fee extended two years (1997 N.Y. Laws ch. 673).

Two-year extension of right to negotiate retirement benefits not requiring approval of State Legislature (1997 N.Y. Laws ch. 151).

Veto

Independent hearing officer for disciplinary charges against State managerial/confidential employees (no. 17).

Early retirement option for New York City teachers (no. 42).

Arbitration for CSL § 75 discharge proceeding (no. 68).

Bills

S./6436/A.9867 Remove police and fire impasses from jurisdiction of mini-PERBs (remained in committee).

S.6328A/A.9265 Prohibits use of state funds to discourage union organization (passed both Houses; not yet forwarded to Governor).

Representation

Town of Brookhaven, 30 PERB ¶ 3040. Rate of return test for coverage of seasonal employees abandoned. That part of State of New York 5 PERB ¶ 3022 & ¶ 3039 reversed.

Manchester-Shortsville Central School District, 30 PERB ¶ 3050. Teaching assistants most appropriately added to faculty unit notwithstanding wage and benefit disparity.

Town of Saugerties, 31 PERB ¶ 3001. Decertification petition not barred by earlier contract as contract was not final in substantial respects.

IMPROPER PRACTICES

Interference/Discrimination

IBT, Local 182 (Hoke), 30 PERB ¶ 3005. Union may disclaim representation status only by unequivocal declaration on advance notice to all interested parties.

State of New York (DOL), 30 PERB ¶ 3045. Discrepancy in an employer's stated reasons for personnel action is relevant to credibility and motive but not necessarily dispositive. Employer's reasons not originally stated properly received into evidence.

Greenburgh No. 11 Union Free School District, 30 PERB ¶ 3052. Demonstration involving 30-40 unit employees to protest disciplinary action taken and pending against unit employees held protected activity. On facts, demonstration not violent, disorderly or disruptive. Discipline imposed upon employees for participation in demonstration per se unlawful and ordered rescinded. Separate incident involving one employee's verbal/physical altercation with employer's security guard held not protected activity. (Appeal pending.)

Village of Scotia v. PERB, 241 A.D.2d 29, 31 PERB ¶ 7008 (3d Dep't 1998). Police union's vice president's private letter to Village's legislative body harshly critical of chief of police and his public position on proposed subcontracting of police work held concerted and protected under Act confirming PERB's decision (29 PERB ¶ 3071). Limited remand on remedy ordering reinstatement to rank of sergeant.

West Genesee Central School District, 31 PERB ¶ 3005. District's denial of shared decision-making training to union appointees to building level committee no violation. Denial was based upon alleged disqualification of appointees from committee membership because of conditions attached to appointment by union.

Good Faith Bargaining

State of New York, 30 PERB ¶ 3037. No duty to disclose responses to wage surveys to union because union did not need them to assess reasonableness of its own proposals.

City of Glens Falls, 30 PERB ¶ 3047. Nonmandatory subjects of negotiation not made mandatory by virtue of incorporation of subject in collective bargaining agreement. Johnstown PBA, 25 PERB ¶ 3085 reaffirmed.

New York State Canal Corporation, 30 PERB ¶ 3070. Party urging waiver of bargaining rights bears burden of proof on that issue. No waiver if two interpretations of contract are equally reasonable and one is inconsistent with waiver.

Unilateral Change/Discontinuation of Expired Contract Terms

New York City Transit Authority & MABSTOA, 30 PERB ¶ 3030. Standards for disqualification of bus drivers greater than those fixed by VTL mandatorily negotiable and not exempted from negotiation by VTL. (Appeal pending.)

Patchogue-Medford Union Free School District, 30 PERB ¶ 3041. Unilateral imposition of sexual harassment regulation requiring employee to participate in investigation mandatorily negotiable. Bargaining not preempted by Title IX of Education Amendments of 1972. (Appeal pending.)

Village of Walden, 30 PERB ¶ 3053. Clause in parties' grievance procedure giving Town right to continue all past practices "in its discretion" was waiver of bargaining rights. Change in past practice no violation. Reversed 31 PERB ¶ 7003 (Sup. Ct. Albany County 1998). Contract clause ambiguous. Therefore, no waiver of bargaining rights.

Greece Support Service Employees Ass'n v. PERB, _____ A.D.2d _____, 31 PERB ¶ 7010 (3d Dep't 1998). Employer not obligated to recalculate salary rates under COLA clause in expired agreement. Parties' intent to adjust salary rate during life of contract only. Court reaffirms employer's duty to advance employees on step of salary schedule.

Subcontracting/Transfer of Unit Work

Vestal Central School District, 30 PERB ¶ 3029, conf'd 175 Misc.2d 98, 30 PERB ¶ 7013 (Sup. Ct. Albany County). Subcontract of printing services to BOCES nonmandatory as Education Law § 1950(4)(d) established legislative intent to exempt decision from mandatory negotiation under Webster CSD, 75 N.Y.2d 619. (Appeal pending.)

Warrensburg Central School District, 30 PERB ¶ 3056. Chaperoning duties not exclusive to charging party's unit. No discernible boundary between elementary and high school activities as unrelated to job duties.

Practice and Procedures

Matter of Halley, 30 PERB 3023. Attorney representative held to have engaged in misconduct by pattern of conduct establishing bad faith intent to delay processing of petitions for decertification.

Patchogue-Medford Union Free School District, 30 PERB ¶ 3041. Education Law § 3813 notice of claim requirements satisfied by District's timely receipt of improper practice charge notwithstanding charge not served upon governing body and did not affirmatively plead satisfaction of requirements.

Matter of Munafo, 31 PERB ¶ 3012. Lay representative barred from appearing before agency as party representative for six months for verbal and physical intimidation of ALJ at and after conference.

Rule Changes

Rule changes, affecting primarily representation proceedings, effective February 28, 1996 and March 15, 1996. Proposals pending to consolidate hearing and exception procedures, to have the ALJ hearing a representation case issue the decision in the case rather than the Director, and to make a few miscellaneous changes of a technical, clarifying or conforming nature.

II. FACT FINDING RESEARCH (CORNELL/ILR SCHOOL)

III. PERB CONTRACT ANALYSIS PROGRAM

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DISCIPLINE and DISABILITIES:

Surviving the Special Education Maze

Materials Prepared by

KAREN NORLANDER, ESQ.
of
Ruberti, Girvin & Ferlazzo, P.C.

July 16, 1998

APPENDIX II

MANIFESTATION DETERMINATION REVIEW

Name of Student: _____ Disability: _____

Date: _____

Description of the Behavior Subject to Disciplinary Action: _____

_____

_____

_____

_____

STEP 1. **The Committee has considered, in terms of the behavior subject to disciplinary action, all relevant information including:**

- ❒ evaluation and diagnostic results, including information supplied by parents;
- ❒ observations of the child;
- ❒ the child's IEP and placement.

After all this information has been considered, proceed to Step 2.

STEP 2. **The Committee must then answer the following three questions.**

A. In relationship to the behavior at issue, was the child's IEP and placement appropriate and were the special education services, supplementary aids and services, and behavior intervention strategies provided consistent with the child's IEP and placement?

❒ YES ❒ NO

B. Did the child's disability impair his/her ability to understand the impact and consequences of the behavior at issue?

❒ YES ❒ NO

C. Did the child's disability impair the ability of the child to control the behavior subject to disciplinary action?

❒ YES ❒ NO

If the answer to question "A" is "YES" and the answers to questions "B" and "C" are "NO," the behavior at issue is not a manifestation of the child's disability, and the relevant disciplinary procedures may be applied in the same manner in which they would be applied to children without disabilities, except that the disabled child must continue to receive a free appropriate public education (FAPE).

Proceed to STEP 3

If the answer to question "A" is "NO," or if the answer to question "B" or question "C" is "YES," the behavior at issue must be characterized as being a manifestation of the child's disability and no further disciplinary action may be taken except the Student may be unilaterally placed in an Interim Alternative Educational Setting if:

1. the Student carried a weapon to school or to a school function;

2. the Student knowingly possessed a controlled substance, or sells or solicits the sale of illegal drugs while at school or at a school function;

3. an impartial hearing officer orders placement in an interim alternative education setting (IAES).

Proceed to STEP 3.

STEP 3. The Committee must also answer the following questions and take the appropriate action.

A. Did the District conduct a functional behavioral assessment of the student and implement a behavior intervention plan for this student prior to the incident at issue?

❒ YES ❒ NO

If the answer is "YES," the Committee must review the plan and modify it, as necessary, to address the behavior.

If the answer is "NO," the District must convene a CSE meeting to develop an assessment plan to address the behavior at issue.

§1415(k)	**DISCIPLINE OF CHILDREN WITH DISABILITIES** **Placement in an Alternative Educational Setting** School personnel may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting, another setting, or suspension for not more than 10 school days to the same extent the alternative would be applied to children without disabilities, or [the CSE may place the child in an appropriate interim alternative placement for up to 45 calendar days if: The child carried a weapon to school or to a school function; The child knowingly possessed or used illegal drugs or sold or solicited the sale of a controlled substance while at school or a school function]; or The district obtains an order from an impartial hearing officer to that effect.
18 U.S.C. §930 §1415(k)(10)(A)(B) §1415(l)	**DEFINITIONS** Weapons: A weapon, device, instrument, material or substance, animate or inanimate, that is used for or is readily capable of causing death or serious bodily injury, except that such term does not include a pocket knife with a blade less than 2 ½ inches. Illegal Drug: A controlled substance: does not include a substance that is legally possessed or used under the supervision of a licensed health care professional or used under any other provision of federal law. Substantial Evidence: more than a preponderance of the evidence.

Developed by Karen Norlander

§1415 (k)(3)(B)	**Interim Alternative Educational Setting must be determined by the CSE and must be selected so as to:** **(1) Enable the child to continue to participate in the general curriculum although in another setting;** **(2) Continue the services and modifications, including those on the IEP to enable the child to meet his/her IEP goals;** **(3) Include services and modifications designed to address the behavior leading to the change in placement so that it does not recur.**
§1415 (k)(2)	**Authority of the Impartial Hearing Officer** An impartial hearing officer may order a change in the placement of a child with a disability to an appropriate interim alternative education setting for not more than 45 days if the hearing officer: Determines that the district has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others; Considers the appropriateness of the child's current educational placement; Considers whether the public agency has made reasonable efforts to minimize the risk of harm to the child's current placement, including the use of supplementary aids and services; Determines that the interim alternative educational setting is selected to enable the child to continue to participate in the general curriculum although in another setting: To enable the child to continue to receive those services and modifications, including those in the child's current IEP to enable the child to meet the goals in that IEP; and Includes services and modifications designed to address the behavior leading to the disciplinary action so that it does not recur.
§1415(k)(4)(B)	**Immediately, but in no case later than 10 school days after the date on which the decision to impose a disciplinary action involving a change of placement (more than ten school days) the CSE and other qualified personnel must:** **Convene a meeting to develop an assessment plan to address the child's behavior if a functional behavioral assessment had not been conducted and a behavior intervention plan not implemented before the behavior resulting in the suspension occurred; OR,** **If the child has a behavior intervention plan, the CSE must review and modify it, as necessary, to address the behavior.**

§1415(k)(4)	**Conduct a review of the relationship between the child's disability and the behavior subject to the disciplinary action:** **In making the determination, the CSE must first consider, in terms of the behavior subject to disciplinary action, all relevant information including:** **Evaluation and diagnostic results and other relevant information supplied by the parents of the child;** **Observations of the child; and** **The child's IEP and placement; and** **Then determine that in relationship to the behavior subject to disciplinary action:** The child's IEP and placement were appropriate and that the special education services, supplementary aids and services, and behavior intervention strategies were provided in a manner consistent with the child's IEP and placement; **The child's disability did not impair the child's ability to understand the impact and consequences of the behavior subject to disciplinary action;** **The disability did not impair the ability of the child to control the behavior subject to disciplinary action;**
§1415(k)(5) §1412(a)(1)	**Determination That Behavior Is Not a Manifestation of the Disability** If the result of the CSE review is a determination that the behavior is not a manifestation of the disability, the relevant disciplinary procedures applicable to children without disabilities may be applied in the same manner, except that the district must continue to provide a FAPE and the special education and disciplinary records of the child must be transmitted to the person making the final determination regarding the disciplinary action. If the discipline involves a change of placement (i.e. more than 10 school days), the case must be referred back to the CSE to ensure the continuation of a FAPE.
§1415(k)(4)(a)(1)	**Notice of All Procedural Safeguards** **Must be given to the parent as soon as a decision contemplated to change the student's placement for more than 10 school days.**

§1415 (k)(6)	**Parent Appeal of Manifestation Determination or Placement** If the parent appeals either the determination that the behavior was not a manifestation of the disability or any decision regarding placement, the parent may request an impartial hearing which must be scheduled in an expedited manner.
§1415 (k)(7)	**Placement During Appeals** The child shall remain in the current educational placement (where the child was placed prior to the interim alternative educational setting) [or in the alternative interim setting for up to 45 days or pending the decision of the hearing officer whichever occurs first if: (i) the child was found carrying a weapon to school or to a school function; (ii) the child knowingly possessed or used drugs or sold or solicited the sale of a controlled substance in school or at a school function; (iii) upon an order from the impartial hearing officer.] Unless the parent and the State or school district agree otherwise.
§1415 (k)(8)(B)	**Protections for Children Not Yet Eligible for Special Education and Related Services** A parent may assert any of the protections provided in this section if the district had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. The district will be deemed to have knowledge if: The parent of the child has expressed concern in writing (unless the parent in illiterate or has a disability that prevents compliance with this requirement) to personnel of the district that the child is in need of special education and related services: The behavior or performance of the child demonstrates the need for such services; The parent of the child has requested an evaluation under the IDEA; The teacher of the child or other district personnel has expressed concern about the behavior or performance of the child to the director of special education or to other personnel in the district.

PROCEDURES GOVERNING THE SUSPENSION OF CHILDREN WITH DISABILITIES FOR MORE THAN TEN DAYS IN NEW YORK STATE

DAY 1[1]

1. Student commits an act which is the subject of an out of school suspension.

2. Principal provides written notice to the parent of:

   a. The basis for the suspension;
   b. The right to request an informal conference.

3. Referral for a Superintendent's hearing if the principal is seeking a suspension of five days or more.

4. Notice to CSE Chairperson of pending Superintendent's hearing involving a child with a disability or a child whom the district "has reason to believe may be disabled".[2]

[1] All references to days refer to school days except the 45 days which refers to calendar days

[2] The district will be presumed to have reason to believe that the child may be disabled if:

- The parent of the child has expressed concern in writing to school personnel of the need for special education and related services;
- The behavior or performance of the child demonstrates the need for such services;
- The parent has requested an evaluation from the CSE;
- The teacher or other personnel has expressed concern about the behavior or performance of the child to the Director of Special Education or other district staff.
- The child was previously classified (*Appeal of a Child Suspected of Having a Disability,* 35 Ed. Dept. Rep. 492,(1996)).

If the district has no reason to believe the child may be disabled but the parent refers the child subject to discipline to the CSE for an evaluation, the evaluation must be conducted in an expedited manner and the student must be provided special education and support services if the child is determined to be disabled.

Prepared by Karen Norlander, Esq., 1/98

DAY 2+

5. Notice to parent of CSE meeting (including notice of all procedural safeguards) to be scheduled as soon as possible after the Superintendent's hearing if a suspension for more than ten school days[3] is contemplated.

6. Informal conference with the principal upon the parent's request with an opportunity to question complaining witnesses.

7. Written notice to the parent of Superintendent's hearing, pursuant to Education Law §3214.

DAY 5

8. Superintendent's Hearing - if the child is disabled, was previously classified, or if the district has reason to believe the child may be disabled, conduct fact finding portion of hearing only.[4]

9. If the child is found guilty by the Superintendent and a change of placement for more than ten school days is contemplated, a CSE meeting must be held as soon as possible.

DAY 5 - DAY 10

10. Convene a CSE meeting to determine whether the student's misbehavior is related to his/her disability.

11. First consider all relevant information regarding the behavior subject to the disciplinary action including:

    a. Evaluations and diagnostic results including such results or other relevant information supplied by the parents;
    b. Observations of the child; and
    c. The child's IEP and placement.

(continued on next page)

[3] Consecutive school days or 10 school days over the course of the school year depending on their proximity and duration

[4] *Appeal of a Student with a Disability*, 35 Ed. Dept. Rep. 22, 1995.

DAY 5 - DAY 10 (continued)

12. Then determine that, in relation to the behavior subject to the disciplinary action, that:

    a. The child's IEP and placement were appropriate and the special education services, supplementary aids and services and behavior intervention strategies were provided in a manner consistent with the child's IEP and placement;
    b. The child's disability did not impair his/her ability to understand the impact and consequences of the behavior subject to the disciplinary action; and
    c. The child's disability did not impair his/her ability to control the behavior subject to disciplinary action.

13. Determine whether a behavior intervention plan is in place:

    a. If not, the CSE must develop an assessment plan to address the behavior leading to the disciplinary action.
    b. If yes, the CSE must review the plan and modify it, to the extent necessary, to address the behavior which led to the discipline.

14. If the CSE concludes that the pupil's behavior was not related to the disability[5], refer back to the Superintendent for the dispositional phase of the Superintendent's hearing. The Superintendent must be provided with a copy of the student's special education and disciplinary record prior to issuing a decision but may only consider those disciplinary actions the CSE determines were not related to the disability, i.e. short term suspensions (*Appeal of a Child with a Disability, 36 Ed. Dept. Rep. 273, (1996)*)

15. CSE sends written notice to parent of CSE meeting to modify the IEP if a suspension of more than 10 days is contemplated.

16. Although the student may be suspended or expelled if the CSE determines that the behavior is not related to the disability, the student must continue to receive a FAPE (see 20 USC 1412(a) (1)).

17. After the Superintendent recommends a disposition, the CSE must convene to modify the IEP to provide a FAPE.

(continued on next page)

[5] If the CSE determines that the student's behavior is related to the student's disability, the student must be returned immediately to the current educational placement and the CSE should take immediate steps to remedy any deficiencies in the child's IEP, placement or its implementation.unless the case involves weapons, illegal drugs, or the district obtains an order from an impartial hearing officer (see par. 18)

DAY 5 - DAY 10 (continued)

18. If the parent challenges the CSE's "manifestation determination" or any decision regarding the student's placement, the district must schedule an expedited impartial hearing and the child must be returned to the current educational placement unless the board of education and parent agree otherwise UNLESS:

    a. The child was found guilty of: 1) carrying a weapon[6] to school or to a school function; 2) knowingly possessing or using illegal drugs[7] or selling or soliciting the sale of a controlled substance while at school or at a school function, the student may be placed in an appropriate interim alternative educational setting[8] for up to 45 days[9] or until a decision of a hearing officer, whichever comes first; OR
    b. The district requests an expedited hearing and the hearing officer orders that the student be placed in an interim alternative educational setting for up to 45 days based on a finding that the child is substantially likely to cause injury to him/herself or others and the district has made reasonable efforts to minimize the risk of harm.

19. If a crime has been committed, nothing in the IDEA prevents a district from reporting such crime to appropriate law enforcement agents. However, any referral of a child with a disability shall be accompanied with special education and disciplinary records (under NY Law and the Gun Free Schools Act the district must notify appropriate law enforcement when the crime involves the possession of a firearm).

6 A dangerous weapon means a weapon, device instrument material or substance, animate or inanimate, that is used for, or is readily capable of causing death or serious bodily injury, except that such term does not include a pocket knife with a blade less than 21/2 inches long.

7 An illegal drug means a controlled substance but <u>not</u> a substance that is legally possessed or used under the supervision of a licensed health care professional or under the authority of the IDEA or other federal law.

8 An interim alternative educational setting is defined as one: a) selected so as to enable the child to continue to participate in the general curriculum although in another setting, b) which enables the student to continue to receive those services and modifications, including those in the current IEP, and c) includes services and modifications designed to address the behavior resulting in the disciplinary action so that it does not recur.

9 If the student's behavior is a manifestation of his/her disability, the CSE should take immediate steps to remedy any deficiencies in the child's IEP, placement or implementation which should enable the student to return to the current educational placement before the expiration of the 45 day period [*Note 2 proposed federal regulations at 34 CFR 300.523*].

Day 45

20. Students found guilty of bringing a weapon to school or to a school function, using, selling or soliciting an illegal or controlled substance at school or at a school function or ordered into an appropriate interim alternative educational setting by a hearing officer must be returned to the previous educational placement unless the district obtains a further order from an impartial hearing officer to have the child remain up to 45 days more in an appropriate alternative interim educational setting or a hearing officer orders a change of placement prior to the expiration of the 45 days.

Prepared by Karen Norlander, Esq., 1/98

AVOIDING THE SPECIAL EDUCATION MAZE

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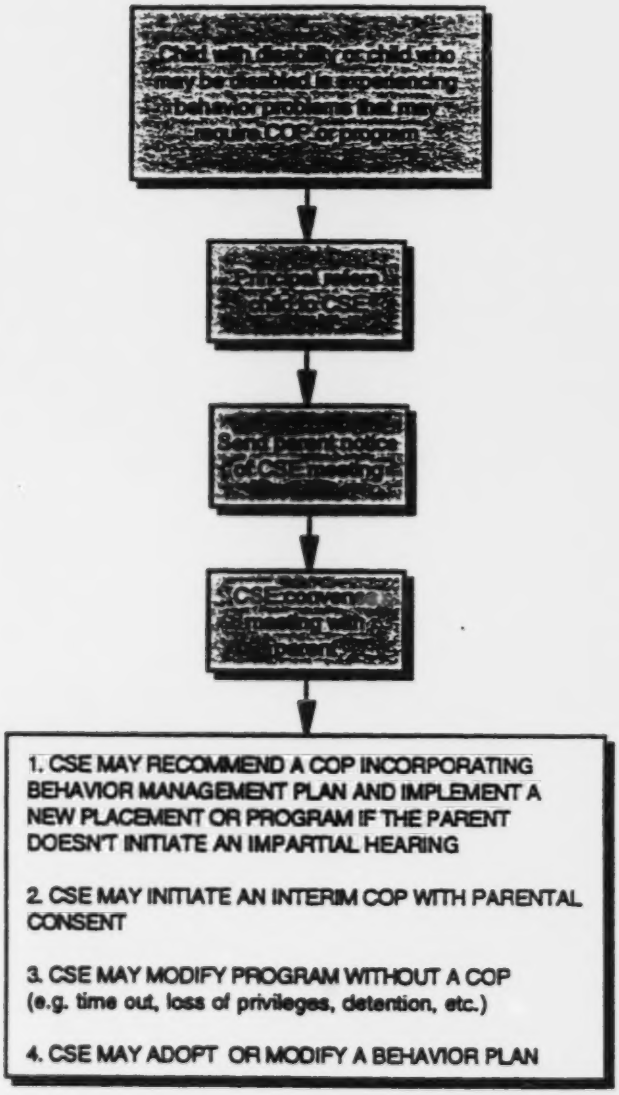
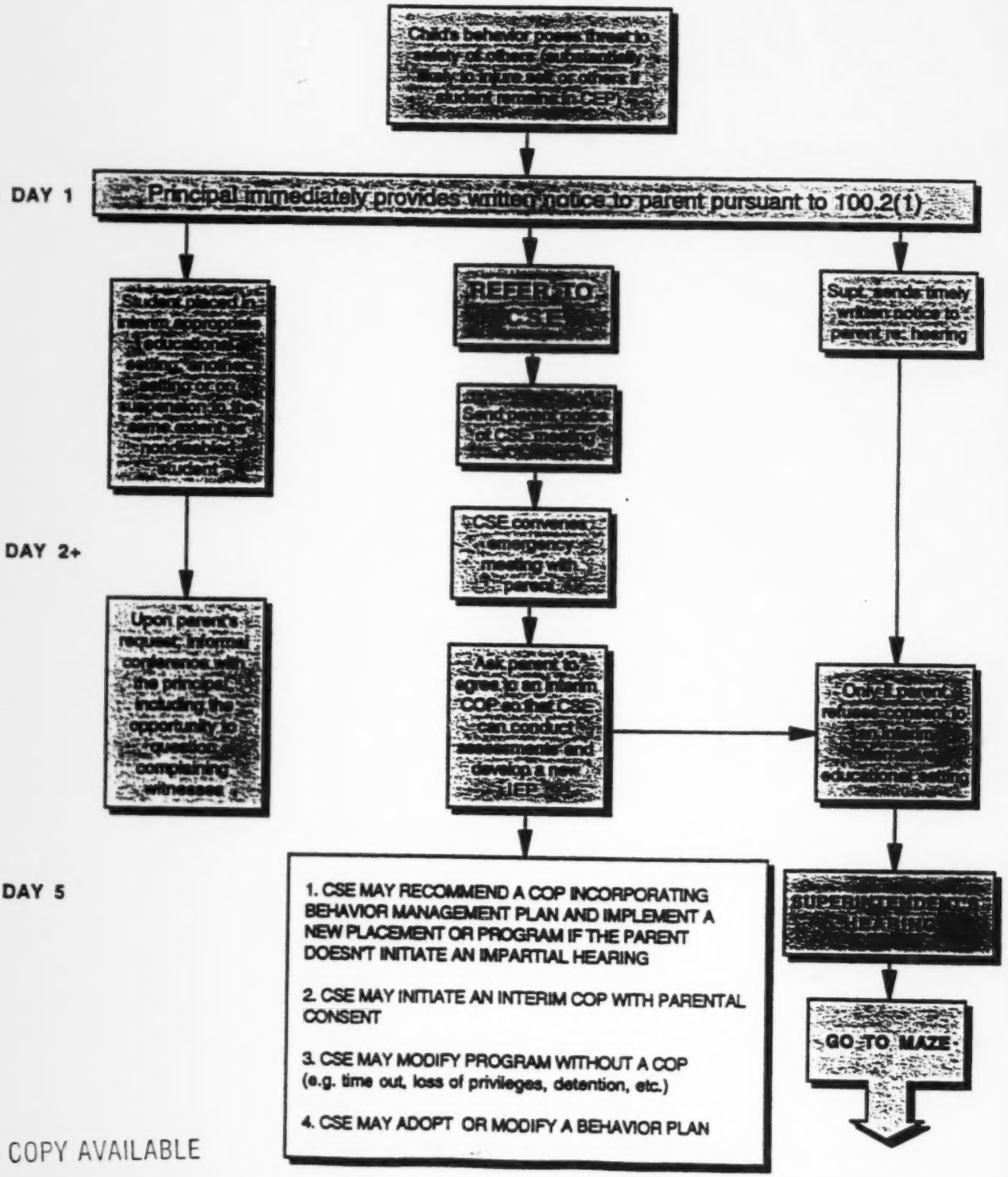

Child with disability or child who may be disabled is experiencing behavior problems that may require COP or program
Send parent notice of CSE meeting
1. CSE MAY RECOMMEND A COP INCORPORATING BEHAVIOR MANAGEMENT PLAN AND IMPLEMENT A NEW PLACEMENT OR PROGRAM IF THE PARENT DOESN'T INITIATE AN IMPARTIAL HEARING
2. CSE MAY INITIATE AN INTERIM COP WITH PARENTAL CONSENT
3. CSE MAY MODIFY PROGRAM WITHOUT A COP (e.g. time out, loss of privileges, detention, etc.)
4. CSE MAY ADOPT OR MODIFY A BEHAVIOR PLAN

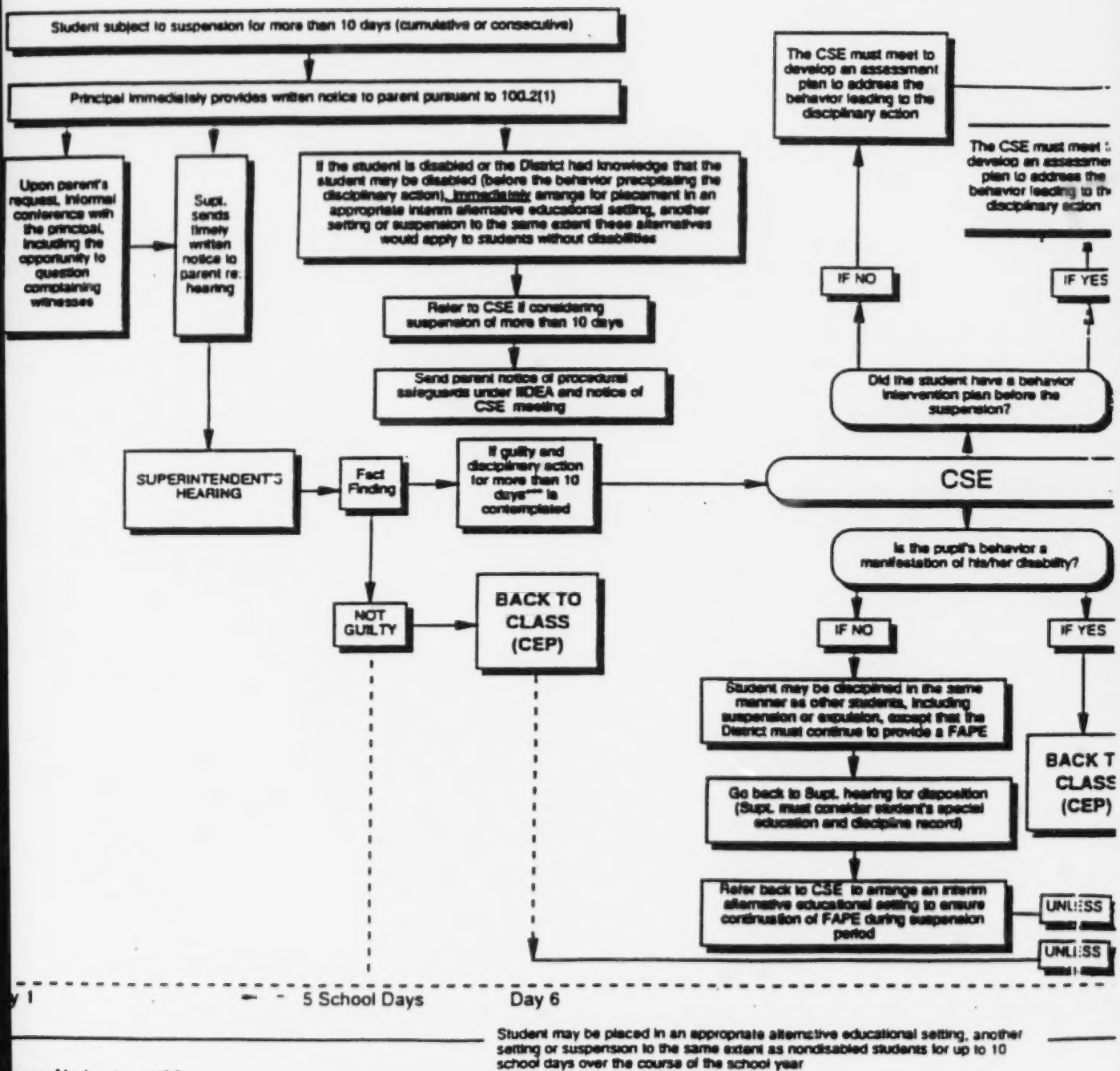
BEST COPY AVAILABLE

AVOIDING THE SPECIAL EDUCATION MAZE
(FOR STUDENTS WHOSE BEHAVIOR MAY BE DANGEROUS)

©Karen Norlander, 1/98


Child's behavior poses threat to safety of others (substantially likely to injure self or others if student remains in CEP)
DAY 1
Principal immediately provides written notice to parent pursuant to 100.2(1)
Student placed in interim appropriate educational setting, another setting or short suspension to the same extent as a non-disabled student
REFER TO CSE
Supt. sends timely written notice to parent re: hearing
Send parent notice of CSE meeting
DAY 2+
CSE convenes emergency meeting with parent
Upon parent's request, informal conference with the principal, including the opportunity to question complaining witnesses
Ask parent to agree to an interim COP so that CSE can conduct assessments and develop a new IEP
Only if parent refuses consent to
educational setting
DAY 5
1. CSE MAY RECOMMEND A COP INCORPORATING BEHAVIOR MANAGEMENT PLAN AND IMPLEMENT A NEW PLACEMENT OR PROGRAM IF THE PARENT DOESN'T INITIATE AN IMPARTIAL HEARING
2. CSE MAY INITIATE AN INTERIM COP WITH PARENTAL CONSENT
3. CSE MAY MODIFY PROGRAM WITHOUT A COP (e.g. time out, loss of privileges, detention, etc.)
4. CSE MAY ADOPT OR MODIFY A BEHAVIOR PLAN
SUPERINTENDENT'S HEARING
GO TO MAZE

BEST COPY AVAILABLE


Student subject to suspension for more than 10 days (cumulative or consecutive)
Principal immediately provides written notice to parent pursuant to 100.2(1)
Upon parent's request, informal conference with the principal, including the opportunity to question complaining witnesses
Supt. sends timely written notice to parent re: hearing
If the student is disabled or the District had knowledge that the student may be disabled (before the behavior precipitating the disciplinary action), immediately arrange for placement in an appropriate interim alternative educational setting, another setting or suspension to the same extent these alternatives would apply to students without disabilities
Refer to CSE if considering suspension of more than 10 days
Send parent notice of procedural safeguards under IDEA and notice of CSE meeting
SUPERINTENDENT'S HEARING
Fact Finding
If guilty and disciplinary action for more than 10 days*** is contemplated
NOT GUILTY
BACK TO CLASS (CEP)
The CSE must meet to develop an assessment plan to address the behavior leading to the disciplinary action
The CSE must meet t develop an assessme plan to address the behavior leading to th disciplinary action
IF NO
IF YES
Did the student have a behavior intervention plan before the suspension?
CSE
Is the pupil's behavior a manifestation of his/her disability?
IF NO
IF YES
Student may be disciplined in the same manner as other students, including suspension or expulsion, except that the District must continue to provide a FAPE
Go back to Supt. hearing for disposition (Supt. must consider student's special education and discipline record)
Refer back to CSE to arrange an interim alternative educational setting to ensure continuation of FAPE during suspension period
UNLESS
UNLESS
BACK T CLASS (CEP)
y 1
5 School Days
Day 6
Student may be placed in an appropriate alternative educational setting, another setting or suspension to the same extent as nondisabled students for up to 10 school days over the course of the school year

aren Norlander, 1/98

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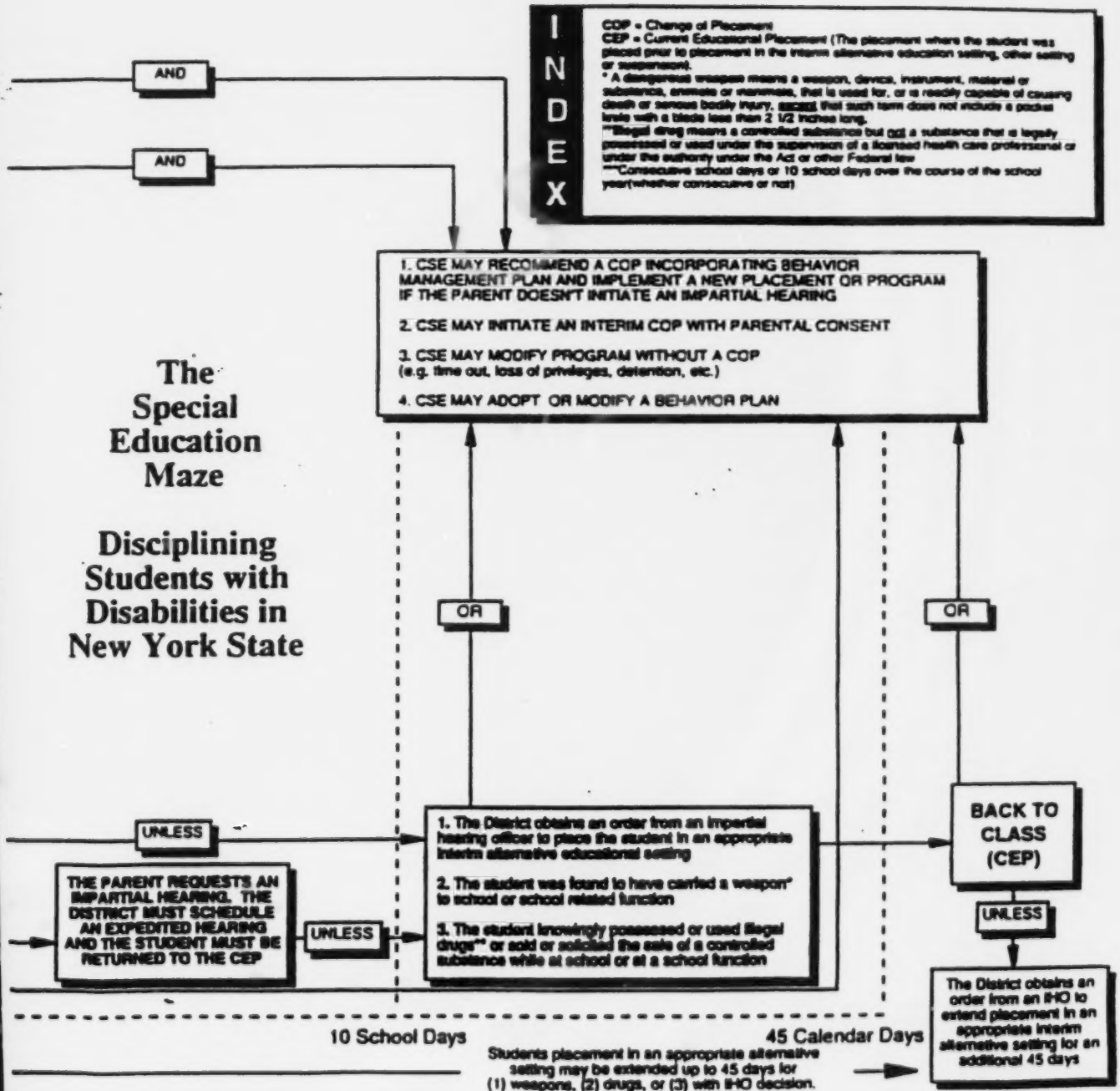
The Special Education Maze

Disciplining Students with Disabilities in New York State


INDEX
COP = Change of Placement
CEP = Current Educational Placement (The placement where the student was placed prior to placement in the interim alternative education setting, other setting or suspension).
* A dangerous weapon means a weapon, device, instrument, material or substance, animate or inanimate, that is used for, or is readily capable of causing death or serious bodily injury, except that such term does not include a pocket knife with a blade less than 2 1/2 inches long.
** Illegal drug means a controlled substance but not a substance that is legally possessed or used under the supervision of a licensed health care professional or under the authority under the Act or other Federal law
*** Consecutive school days or 10 school days over the course of the school year(whether consecutive or not)
AND
AND
1. CSE MAY RECOMMEND A COP INCORPORATING BEHAVIOR MANAGEMENT PLAN AND IMPLEMENT A NEW PLACEMENT OR PROGRAM IF THE PARENT DOESN'T INITIATE AN IMPARTIAL HEARING
2. CSE MAY INITIATE AN INTERIM COP WITH PARENTAL CONSENT
3. CSE MAY MODIFY PROGRAM WITHOUT A COP (e.g. time out, loss of privileges, detention, etc.)
4. CSE MAY ADOPT OR MODIFY A BEHAVIOR PLAN
OR
OR
UNLESS
THE PARENT REQUESTS AN IMPARTIAL HEARING. THE DISTRICT MUST SCHEDULE AN EXPEDITED HEARING AND THE STUDENT MUST BE RETURNED TO THE CEP
UNLESS
1. The District obtains an order from an impartial hearing officer to place the student in an appropriate interim alternative educational setting
2. The student was found to have carried a weapon* to school or school related function
3. The student knowingly possessed or used illegal drugs** or sold or solicited the sale of a controlled substance while at school or at a school function
BACK TO CLASS (CEP)
UNLESS
The District obtains an order from an IHO to extend placement in an appropriate interim alternative setting for an additional 45 days
10 School Days
45 Calendar Days
Students placement in an appropriate alternative setting may be extended up to 45 days for (1) weapons, (2) drugs, or (3) with IHO decision.

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TERMINATION OF TEACHERS DURING THE PROBATIONARY PERIOD & THE REQUIREMENT FOR NAME-CLEARING HEARINGS

PRESENTED BY
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INTRODUCTION

A probationary teacher or administrator[1] in New York State may be dismissed during the probationary term, or denied tenure, for any reason, so long as it is not constitutionally impermissible or in violation of statutory prohibition, *cf Merhige v. Copiague School District*, 76 AD2d 926 (2d Dept., 1980) and cases cited therein. (The statutes most commonly cited by those claiming violation of a statutory prohibition are the State or Federal prohibitions against discrimination in employment, and the Taylor Law.)

There is no functional distinction between the process for dismissing prior to the end of the probationary period, and the process for denying tenure, both of which must comply with Education Law §§ 3031 and 3019-a. The latter section provides for notice of at least 30 days prior to termination for any probationary teacher. The more significant procedural aspects of the process for termination and denial of tenure are set forth in §3031.

Virtually all decisions about teacher employment require "the concurrence of the superintendent of schools (generally representing the points of view of professional educators) and the board of education (representing the points of view of the community and those charged with superintendence and management of the educational affairs of the district)," *Anderson v. BOE, City of Yonkers* 38 NY2d 897 (Ct. App., 1976). In order for a teacher to be granted tenure, the Superintendent of Schools must recommend that grant, and the Board of Education must vote in the affirmative. In order for a teacher to be terminated, the Superintendent must recommend either termination or the denial of tenure, and the Board must act on that recommendation. There is a process which must be followed if the Board intends to deny tenure despite the affirmative recommendation of the Superintendent that it be granted; that process will be discussed somewhat later.

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[1]For convenience, all further references will be to teachers; the process is identical for both, since the 1993 amendment of Education Law §3031.

PROCESS–SUPERINTENDENT RECOMMENDS DENIAL OF TENURE OR TERMINATION

When the Superintendent intends to recommend either termination during the probationary period or denial of tenure, §3031 requires that the teacher be given notice of that intention at least 30 calendar days before the meeting at which the Board will be considering the recommendation. The statute does not specify that the notice must be written; however, for practical reasons, the notice should be in writing, and generally hand delivered to the teacher. The teacher then has the right to request a written statement of reasons, and to respond in writing to that statement. The teacher does not have a right to any type of hearing procedure prior to the action of the Board on the recommendation, *cf Matter of Slater*, 12 Ed. Dept. Rep. 275 (1973); however, it is not uncommon that the teacher and his/her union representatives or attorney will request an opportunity to address the Board in person, and it is ultimately less costly to permit that opportunity than to defend a challenge based on the failure to do so. Any such opportunity to address the Board should take place in executive session unless the teacher demands to speak in open session; forcing the teacher to address the Board in open session against his/her will can open the District to a charge of defamation based on the teacher's own statements. Additionally, during any such presentation by the teacher, Board members should listen, and not enter into any discussion or questioning of the teacher, in order to avoid a later claim that they afforded the teacher a hearing, but failed to comply with the elements of due process.

It is important, before embarking on this process, to review the Collective Bargaining Agreement, which may contain requirements for notice or procedures in evaluation which are more extensive than those in the statute. Although failure to comply with the Collective Bargaining Agreement cannot invalidate the termination or denial of tenure, it can result in arbitration with remedies including reinstatement without tenure while the bargained-for procedures are followed, *cf BOE, Bellmore-Merrick Central High School District v. Bellmore-Merrick United Secondary Teachers*, 39 NY2d 167 (Ct. App., 1976); *BOE, Chautauqua CSD v. Chautauqua Central School Teachers Association*, 41 AD2d 47 (4th Dept., 1973).

TIMELINE

The timeline for the above steps is as follows (all days are calendar days):

-The Superintendent informs the teacher (in writing, delivered personally) that he/she will recommend termination/denial of tenure AT LEAST 30 DAYS BEFORE THE BOARD MEETING at which the recommendation will be considered.

-The teacher has UP TO 21 DAYS BEFORE THE MEETING to request a statement of the reasons for the decision.

-The statement of reasons must be transmitted WITHIN 7 DAYS OF RECEIPT OF THE REQUEST.

-The teacher has until SEVEN DAYS BEFORE THE MEETING to submit a written response to the statement of reasons.

-Following the meeting, the Superintendent or Clerk should IMMEDIATELY notify the teacher in writing of the Board's action.

-The effective date of the Board's action should be at least THIRTY DAYS AFTER THE BOARD MEETING if at all possible, §3019-a.[2]

-However, it does sometimes happen that the Board takes action less than thirty days before the end of the probationary period. This does not mean that the teacher gets tenure by estoppel, but she/he is entitled to be paid for the full thirty day period (to the extent that any pay could have been earned for service during the period), even if no services are provided, *cf Zunic v. Nyquist*, 48 AD2d 378 (3d Dept., 1975), *affirmed*, 40 NY2d 962 (Ct. App., 1976). This situation arises most commonly when the probationary period ends during the school year, rather than at the beginning of the year.

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[2]This 30 day period cannot run concurrently with the 30 day notice period of §3031, *Matter of Slater, supra*; the rule is, 30 days before and 30 days after the meeting.

THE STATEMENT OF REASONS

Generally, a limited number of reasons is preferable to a long list, which may appear stigmatizing even though no single reason within it is particularly serious. The reasons given must also be specific. The purpose of the requirement for a statement of reasons is "to force the superintendent to lay bare the reasons for his recommendation so that the probationer [can] ascertain whether any [are] constitutionally or statutorily impermissible," *Merhige, supra.* Statements that the teacher "has not demonstrated superior teaching ability", or "has not lived up to the expectations and quality which the administration feels is necessary," or that the teacher's "overall performance has not been up to the level of expectancy of the District," have been held impermissibly vague, *Farrell v. BOE, Carmel CSD,* 64 AD2d 703 (2d Dept., 1978); *Matter of McGrath,* 13 Ed. Dept. Rep. 50 (1973); *Rathbone v. BOE,* 47 AD2d 172 (1975). The teacher must be told specifically what she/he has failed to do, or has done wrong. However, it is permissible for the statement of reasons to refer to an identifiable document already available to the teacher, such as an evaluation performed during the probationary service, which contains the specific information, *Matter of Berman,* 15. Ed. Dept. Rep 194 (1975). Further, the fact that the reasons are nowhere documented, or have not even been previously communicated to the teacher will not invalidate the decision to terminate or deny tenure, *cf Matter of Norden,* 23 Ed. Dept. Rep 94 (1983); *Matter of Gold,* 24 Ed. Dept. Rep. 372 (1995); *Matter of Fusco,* 31 Ed. Dept. Rep. 119 (1991). However, considerations of good personnel management practices, dictate that the reasons be, to the maximum extent possible, supported by existing documentation in the teacher's record. This also reduces the potential that the teacher will commence any form of legal challenge; even if the challenge will ultimately fail, defending it diverts resources from more important District functions.

Some care is required in constructing the statement of reasons, in order to minimize the potential that the teacher will be entitled to a name-clearing hearing as a result of the reasons given for termination.

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THE NAME-CLEARING HEARING

The question of whether a name-clearing hearing is required arises because of recent Federal Court decisions in *Donato v. Plainview-Old Bethpage Central School District*, 96 F3d 623 (CA2, 1996), *cert. denied*, 117 S.Ct. 1083 (1997), although as early as 1975 the Commissioner and State Courts were suggesting that there might be situations in which such a hearing was required. The statement of reasons in the *Donato* case was held by the Second Circuit to be so potentially stigmatizing as to prevent the employee from finding work as an educational administrator in the future. The Court determined that, under those circumstances, the employee was entitled to an opportunity to clear her name. The Court disclaimed any intent to apply a general requirement for name-clearing hearings in all cases, but provided no bright-line rule to follow in deciding when a hearing is required. On remand, the Federal District Court complicated matters further by holding that the hearing must be conducted by a member of the body that made the decision, but that the hearing officer must be unprejudiced, *Donato v. Plainview-Old Bethpage Central School District*, 985 F.Supp. 316 (EDNY, 1997).

The questions which must be decided, in light of *Donato*, are as follows:

Is the statement of reasons sufficiently stigmatizing to require a hearing?

This decision should be made in conjunction with District counsel. The best practice in many cases is probably to err on the side of caution and assume that it is, if the teacher requests a hearing. Some caution must be exercised, however, unless the District is prepared as a matter of practice to conduct a hearing in every case, not to conduct a hearing where there is clearly no stigma.

Who should conduct the hearing?

When the recommendation comes from the Superintendent, the hearing should be conducted by the Board of Education. The situation in which the Board has denied tenure despite

the Superintendent's recommendation presents a more difficult issue, discussed below.

Should the District offer the opportunity for a hearing, or wait for the employee to request it?

The argument has been made that the hearing should be affirmatively offered, and scheduled for a time prior to the Board vote. However, no stigma can attach until a final decision is made. Although the Board has no authority to grant tenure without the Superintendent's recommendation, it can remand the issue to the Superintendent for reconsideration; with respect to termination prior to the end of the probationary period, the Board is not bound to vote affirmatively on the Superintendent's recommendation. Thus, until the Board has taken action, there is no need for a name-clearing hearing. If, in the event, the teacher is not terminated or denied tenure, her/his professional reputation has not been affected, so the statement of reasons was *ipso facto* not sufficiently stigmatizing to require a hearing. It is therefor appropriate to have the Board take action, and wait to see whether the teacher considers the statement so stigmatizing that he/she demands a hearing.

PROCESS–BOARD DENIAL OF TENURE DESPITE SUPERINTENDENT RECOMMENDATION

The preceding discussion focuses on the most common situation, in which the Superintendent is recommending termination or denial of tenure. However, the Board of Education has the authority to deny tenure, despite the Superintendent's recommendation.[3] The process in that case is somewhat more complicated.

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[3]There is no authority for the Board to take action to terminate the services of a probationary teacher without the recommendation of the Superintendent.

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TIMELINE

Education Law §3031 provides in part as follows:

> Where a board of education. . . votes to reject the recommendation of a superintendent of schools. . . to grant tenure to any teacher. . .employed on probation, such vote shall be considered advisory and at least thirty days prior to the board meeting at which such recommendation is to be finally considered, the board shall notify said teacher. . .of its intention to deny tenure. . .

The timeline for the denial of tenure by a Board despite a positive recommendation by the Superintendent is as follows:

-AT A REGULAR BOARD MEETING the Board takes the advisory vote rejecting the Superintendent's recommendation

-THE NEXT DAY the Board Clerk writes to the teacher informing him/her of the advisory vote and advising her/him of the date of the meeting at which a final vote will be taken, which must be AT LEAST 30 DAYS AFTER HE/SHE RECEIVES NOTICE. This notice should be delivered personally.

-The teacher has UP TO 21 DAYS BEFORE THE MEETING to request a statement of the reasons for the decision.

-The statement of reasons must be transmitted WITHIN 7 DAYS OF RECEIPT OF THE REQUEST.

-The teacher has until SEVEN DAYS BEFORE THE BOARD MEETING AT WHICH FINAL ACTION WILL BE TAKEN to submit a written response to the statement of reasons.

-Following the meeting at which the final vote is taken, the Clerk should immediately notify the teacher in writing of the Board's action. If the final vote was in fact to deny tenure, it should not become effective until at least THIRTY DAYS AFTER THAT BOARD MEETING. Again, however, if there is less than thirty days notice, the teacher is entitled only to be paid for the full 30 days.

DRAFTING THE STATEMENT OF REASONS

Because it is the Board which has concluded that it may not be appropriate for this teacher to receive tenure, the statement of reasons must be developed by the Board. In order to minimize the negative consequences of the statement used, it is helpful to have the school attorney involved in the actual wordsmithing. The considerations with respect to number, nature and basis for the reasons, discussed above, apply with equal force in this instance.

The reason or reasons must be specific, and relevant to the teacher's professional performance. To the maximum extent possible they should be based on documentation within the teacher's file.. In order to avoid personal liability on the part of Board members, the reasons should not be based on adverse personal relationships between the employee and any Board member.

The statement should be discussed by the Board in Executive Session prior to the date on which it must be transmitted to the teacher in accordance with the above timeline. Ideally, it is helpful if one or more Board members can put their specific concerns in writing, with direct reference to the sources of their information, as a focus for the Board's discussion.

Having developed the statement of reasons, the Board should adopt a resolution directing the Clerk to transmit that statement in accordance with the Board's discussion. The statement of reasons itself need not be made part of the public record, nor should the teacher's name be mentioned in the resolution. Advance planning, when it appears the Board may deny tenure despite the Superintendent's recommendation, is strongly recommended, in order to avoid having to draft the statement of reasons at an emergency Board meeting because of the stringent timelines under §3031. The Board can conduct the process of drafting the statement of reasons even before the teacher requests it; in that event, the resolution directing that it be sent should ideally not be adopted until after the request has been received, although it may be necessary to adopt it in advance if there is a concern about whether there will be a Board meeting within the 7-

day period. In any event, the resolution should not be adopted prior to the first, advisory, vote to reject the Superintendent's recommendation.

In order to reduce the risk that the District will become a significant contributor to the developing case law on the subject of name-clearing hearings, the statement should balance the need for specific information against the need to avoid so stigmatizing the employee that he/she will be unable in future to find work in her profession.

THE FINAL VOTE ON TENURE

On the night of the final vote, the Superintendent once again presents his recommendation, and the Board votes on it. Although the Board may discuss the matter in Executive Session prior to voting, the vote must be taken in Open Session. The resolution should be in the same form originally presented and voted on the night of the advisory vote; that is, it should be stated in the affirmative as an appointment to tenure. Unless a majority of the total Board votes in favor, tenure is denied.

THE NAME-CLEARING HEARING

The considerations as to whether a hearing is required, and when and how it should be offered, are as discussed above. However, the question of who conducts the hearing is more complicated. The District Court's holding, in *Donato,* that the hearing must be conducted by a member of the body that made the decision, but that the hearing officer must be unprejudiced, is difficult to satisfy when the Board, which made the decision, is also the body which came up with the statement of reasons. It nonetheless appears that the Board is the proper body to conduct the hearing, unless the teacher can show specific reasons to believe that a majority of the Board is so prejudiced against him/her as to be unable to act impartially. In that event, the Board should appoint a hearing officer in the manner used to appoint Civil Service Law §75 hearing officers.

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RESIGNATION

Wherever possible, it is to the advantage of both the teacher and the District that the teacher resign voluntarily rather than go through the humiliating and potentially stigmatizing process of being denied tenure, or having her/his services terminated. Generally, this occurs during the 30 days notice period prior to the Board meeting. A helpful and cooperative approach in this period can save District resources and avoid undesirable publicity. In discussing resignation, District leadership should be aware that a forced resignation resulting from a threat of termination will not disqualify an employee from the receipt of unemployment benefits, unless the reason for termination constituted disqualifying misconduct pursuant to the Unemployment Insurance Law.